DOCUMENT RESUME

ED 109 049 SO 008 496

TITLE	Amendment of the Constitution by the Convention Method under Article V. Revision of "Amending the U.S. Constitution by Means of a National Constitutional Convention" (August 1972).
INSTITUTION	American Bar Association, Chicago, Ill.
PUB DATE	74
NOTE	102p.
AVAILABLE FROM	American Bar Association, Circulation Department, 1155 East 60th Street, Chicago, Illinois 60637 ($3.50)
EDRS PRICE	MF-$0.76 HC-$5.70 PLUS POSTAGE
DESCRIPTORS	*Change Agents; Change Strategies; Civics; *Constitutional History; *Constitutional Law; Government (Administrative Body); Laws; Organizational Change; Organizational Communication; Political Issues; *Political Science; Politics; Social Change; Social Sciences; United States History
IDENTIFIERS	Article 5; Constitutional Convention; *United States Constitution

ABSTRACT

This report sets forth certain conclusions reached by the Special Constitutional Convention Study Committee of the American Bar Association after conducting a two-year study. The committee was formed to evaluate the ramifications of the constitutional convention method of initiating amendments to the U. S. Constitution as set down in Article 5. It analyzed and studied all aspects of law concerned with calling a national constitutional convention. Particular attention was given to the question of whether a convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of a constitution as a matter of constitutional law opens the convention to multiple amendments and the consideration of a new consitution. Article 5, the origins of the provision, intent of the Framers, and history and workings of the article since 1789, formed background material for the research. The major conclusion reached from the study is that a national constitutional convention can be channeled so as not to be the unleashing of a radical force in the system, but rather an orderly mechanism of effecting constitutional change when circumstances require its use. Appendices illustrate and cross-reference the report. (Author/ND)

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AMENDMENT OF THE CONSTITUTION

BY THE CONVENTION METHOD UNDER ARTICLE V

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AMERICAN BAR ASSOCIATION
SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

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AMERICAN BAR ASSOCIATION

SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

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The following resolutions were approved by the American Bar Association House of Delegates in August, 1973, upon the recommendation of the ABA Constitutional Convention Study Committee.

WHEREAS, the House of Delegates, at its July 1971 meeting, created the Constitutional Convention Study Committee "to analyze and study all questions of law concerned with the calling of a national Constitutional Convention, including, but not limited to, the question of whether such a Convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of such a Convention, as a matter of constitutional law, opens such a Convention to multiple amendments and the consideration of a new Constitution"; and

WHEREAS, the Constitutional Convention Study Committee so created has intensively and exhaustively analyzed and studied the principal questions of law concerned with the calling of a national constitutional convention and has delineated its conclusions with respect to these questions of law in its Report attached hereto,

NOW, THEREFORE, BE IT RESOLVED, THAT, with respect to the provision of Article V of the United States Constitution providing that "Congress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" to the Constitution,

1. It is desirable for Congress to establish procedures for amending the Constitution by means of a national constitutional convention.
2. Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures.
3. Any Congressional legislation dealing with

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such a process for amending the Constitution should provide for limited judicial review of Congressional determinations concerning a constitutional convention.

4. Delegates to a convention should be elected and representation at the convention should be in conformity with the principles of representative democracy as enunciated by the "one person, one vote" decisions of the Supreme Court.

BE IT FURTHER RESOLVED, THAT, the House of Delegates authorizes the distribution of the Report of the Constitutional Convention Study Committee for the careful consideration of Federal and state legislators and others concerned with constitutional law and commends the Report to them; and

BE IT FURTHER RESOLVED, THAT, representatives of the American Bar Association designated by the President be authorized to present testimony on behalf of the Association before the appropriate committees of the Congress consistent with this resolution.

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Our Committee originated from a suggestion by the Council of the Section of Individual Rights and Responsibilities that a special committee representing the entire Association be created to evaluate the ramifications of the constitutional convention method of initiating amendments to the United States Constitution. The suggestion was adopted by the Board of Governors at its meeting in Williamsburg, Virginia, on April 29, 1971, and was accepted by the House of Delegates at its meeting in July 1971.

In forming the Committee, the Association authorized it to analyze and study all questions of law concerned with the calling of a national constitutional convention, including, but not limited to the question of whether a convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of a convention, as a matter of constitutional law, opens a convention to multiple amendments and the consideration of a new constitution.

The Committee thus constituted consists of two United States District Judges, a Judge of the Superior Court of the District of Columbia, a present and a former law school dean, two former presidents of state constitutional conventions, a former Deputy Attorney General of the United States, and a private practitioner with substantial experience in the amending process.

Comprising the Committee are: Warren Christopher, a California attorney, former Deputy Attorney General of the United States, and Vice President of the Los Angeles County Bar Association; David Dow, former Dean and currently Professor of Law, Nebraska College of Law, a

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member of Nebraska's Constitutional Revision Commission, and a former member of the Board of Directors of the American Judicature Society; John D. Feerick, a New York attorney who served as advisor to the Association's Commission on Electoral College Reform and a member of the Association's Conference on Presidential Inability and Succession; Adrian M. Foley, Jr., a New Jersey attorney, a member of the House of Delegates, and President of the Fourth New Jersey Constitutional Convention (1966); Sarah T. Hughes, United States District Judge for the Northern District of Texas; Albert M. Sacks, Dean, The Harvard Law School, and former chairman of the Massachusetts Attorney General's Advisory Committee on Civil Rights and Civil Liberties; William S. Thompson, Judge of the Superior Court of the District of Columbia, chairman of the Association's Committee on World Order Under Law, and a member of the Association's Committee on Federal Legislation; and Samuel W. Witwer, an Illinois attorney, a member of the Board of Directors of the American Judicature Society, and President of the Sixth Illinois Constitutional Convention (1969-1970). Robert D. Evans, assistant director of the Association's Public Service Activities Division, has served ably as our liaison.

Throughout our two-year study the members of the Committee have been ever mindful of the nature and importance of the task entrusted to them and they have endeavored to uncover and understand every fact and point of view regarding the amending article. Beginning with our organizational meeting in Chicago on November 20, 1971, the Committee has met frequently and has spent an enormous amount of time studying, discussing and analyzing the questions concerned with the calling of a national constitutional convention. We all have been guided by the hope of rendering to the Association a thorough, objective and realistically constructive final report on a fundamental article of the United States Constitution, as other special committees have done in such fields as presidential succession and electoral college reform.

In August 1972 we filed with the House of Delegates a detailed interim report setting forth certain tentative conclusions reached as a result of

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our research and deliberations since our organizational meeting. Since that report, we have re-examined all of the matters commented upon in it and have studied other questions concerning the amending article which were not specifically discussed in our earlier report.

In our work the Committee has been the beneficiary of substantial quantities of valuable research and background material provided by twelve law students, to whom we express our deep gratitude. These students are: Richard Altabef, Edward Miller, Mark Wattenberg, and Richard Weisberg of Columbia Law School; Joan Madden and Barbara Manners of Fordham Law School; Shelley Z. Green and Henry D. Levine of Harvard Law School; Andrew N. Karlen and Barbara Prager of New York Law School; Michael Harris of St. John's Law School; and Marjorie Elkin of Yale Law School. The memoranda and papers prepared by these students have been filed at the Cromwell Library in the American Bar Center in Chicago.

I take pride in the fact that the conclusions and recommendations set forth in this report are unanimous (in every instance but one*).

C. Clyde Atkins,+
Chairman

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*That single instance appears at page 10, *infra*.

+The Committee's Chairman is a United States District Judge for the Southern District of Florida, a former member of the House of Delegates (1960-66), and a past president of the Florida Bar (1960-61).

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There are few articles of the Constitution as important to the continued viability of our government and nation as Article V. As Justice Joseph Story wrote: "A government which . . . provides no means of change . . . will either degenerate into a despotism or, by the pressure of its inequities, bring on a revolution."[1] James Madison gave these reasons for Article V:

> "That useful alterations [in the Constitution] will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[2]

Article V sets forth two methods of proposing and two methods of ratifying amendments to the United States Constitution:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ."

Up to the present time all amendments have been proposed by the Congress and all but one have been ratified by the state legislature mode. The Twenty-First Amendment was ratified by conventions called in the various states. Although there

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has not been a national constitutional convention since 1787, there have been more than 300 applications from state legislatures over the past 184 years seeking such a convention.* Every state, at one time or another, has petitioned Congress for a convention. These state applications have ranged from applications calling for a general convention to a convention dealing with a specific subject, as, for example, slavery, anti-polygamy, presidential tenure, and repeal of prohibition. The pressure generated by numerous petitions for a constitutional convention is believed to have been a factor in motivating Congress to propose the Seventeenth Amendment to change the method of selecting Senators.

Despite the absence at the national level since 1787, conventions have been the preferred instrument for major revision of state constitutions. As one commentator on the state constitution-making process has stated: "The convention is purely American—widely tested and used."[3] There have been more than 200 conventions in the states, ranging from 15 in New Hampshire to one in eleven states. In a substantial majority of the states the convention is provided for by the state constitution. In the remainder it has been sanctioned by judicial interpretation and practice.[4]

Renewed and greater efforts to call a national constitutional convention have come in the aftermath of the Supreme Court's decisions in *Baker* v. *Carr*[5] and *Reynolds* v. *Sims*.[6] Shortly after the decision in *Baker* v. *Carr*, the Council of State Governments recommended that the states petition Congress for a national constitutional convention to propose three amendments to the Constitution. One would have denied to federal courts original and appellate jurisdiction over state legislative apportionment cases; another would have established a "Court of the Union" in place of the Supreme Court; and the third would have amended Article V to allow amendments to be adopted on the basis of identically-worded state petitions.[7] Twelve state petitions were sent to Congress in 1963 and 1964 requesting a convention to propose an amendment which would remove state legisla-

*These applications are classified by subject and state in *Appendix B*, Part One. They are also discussed generally in Barbara Prager's paper, which is also included in *Appendix B*, Part Two.

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tive apportionment cases from the jurisdiction of the federal judiciary. In December 1964 the Council of State Governments recommended at its annual convention that the state legislatures petition Congress for a national constitutional convention to propose an amendment permitting one house of a state legislature to be apportioned on a basis other than population.

By 1967 thirty-two state legislatures had adopted applications calling for a constitutional convention on the question of apportionment. The wording of these petitions varied. Several sought consideration of an amendment to abolish federal judicial review of state legislative apportionment. Others sought a convention for the purpose of proposing an amendment which would "secure to the people the right of some choice in the method of apportionment of one house of a state legislature on a basis other than population alone." A substantial majority of states requested a convention to propose a specific amendment set forth *haec verba* in their petitions. Even here, there was variation of wording among a few of these state petitions.[8]

On March 18, 1967 a front page story in *The New York Times* reported that "a campaign for a constitutional convention to modify the Supreme Court's one-man, one-vote rule is nearing success." It said that the opponents of the rule "lack only two states in their drive" and that "most of official Washington has been caught by surprise because the state legislative actions have been taken with little fanfare." That article prompted immediate and considerable discussion of the subject both in and out of Congress. It was urged that Congress would be under no duty to call a convention even if applications were received from the legislatures of two-thirds of the states. Others argued that the words of Article V were imperative and that there would be such a duty. There was disagreement as to whether applications from malapportioned legislatures could be counted, and there were different views on the authority of any convention. Some maintained that, once constituted, a convention could not be restricted to the subject on which the state legislatures had requested action but could go so far as to propose an entirely new Constitution. Adding to the confusion and uncertainty was the

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fact that there were no ground rules or precedents for amending the Constitution through the route of a constitutional convention.

As the debate on the convention method of initiating amendments continued into 1969, one additional state* submitted an application for a convention on the reapportionment issue while another state adopted a resolution rescinding its previous application.[9] Thereafter, the effort to call a convention on that issue diminished. Recently, however, the filing of state applications for a convention on the school busing issue has led to a new flurry of discussion on the question of a national constitutional convention.

The circumstances surrounding the apportionment applications prompted Senator Sam J. Ervin to introduce in the Senate on August 17, 1967 a bill to establish procedures for calling a constitutional convention. In explaining his reasons for the proposed legislation, Senator Ervin has stated:

> "My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment—and I am admittedly a partisan on the issue—should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process."[10]

After hearings and amendments to the original legislation, Senator Ervin's bill (S.215) passed the Senate by an 84 to 0 vote on October 19, 1971.[11] Although there was no action in the House of Representatives in the Ninety-Second Session of Congress, comparable legislation is expected to receive attention in both Houses in the future.+

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*Making thirty-three in all, including applications from two state legislatures made in 1963.

+S. 215 was re-introduced in the Senate on March 19, 1973, as S.1272 and was favorably reported out of the Subcommittee on Separation of Powers on June 6, 1973, and passed the Senate July 9, 1973. That legislation is set forth and discussed in *Appendix A*.

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The submission by state legislatures during the past thirty-five years of numerous applications for a national constitutional convention has brought into sharp focus the manifold issues arising under Article V. Included among these issues are the following:

1) If the legislatures of two-thirds of the states apply for a convention limited to a specific matter, must Congress call such a convention?
2) If a convention is called, is the limitation binding on the convention?
3) What constitutes a valid application which Congress must count and who is to judge its validity?
4) What is the length of time in which applications for a convention will be counted?
5) How much power does Congress have as to the scope of a convention? As to procedures such as the selection of delegates? As to the voting requirements at a convention? As to refusing to submit to the states for ratification the product of a convention?
6) What are the roles of the President and state governors in the amending process?
7) Can a state legislature withdraw an application for a convention once it has been submitted to Congress or rescind a previous ratification of a proposed amendment or a previous rejection?
8) Are issues arising in the convention process justiciable?
9) Who is to decide questions of ratification?

Since there has never been a national constitutional convention subsequent to the adoption of the

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Constitution, there is no direct precedent to look to in attempting to answer these questions. In searching out the answers, therefore, resort must be made, among other things, to the text of Article V, the origins of the provision, the intent of the Framers, and the history and workings of the amending article since 1789. Our answers appear on the following pages.*

*While we also have studied a great many related and peripheral issues, our conclusions and recommendations are limited to the principal questions.

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General

Responding to our charge, our Committee has attempted to canvass all the principal questions of law involved in the calling of a national constitutional convention pursuant to Article V. At the outset, we note that some, apprehensive about the scope of constitutional change possible in a national constitutional convention, have proposed that Article V be amended so as to delete or modify the convention method of proposing amendments.[12] On the other hand, others have noted that a dual method of constitutional change was intended by the Framers, and they contend that relative ease of amendment is salutary, at least within limits. Whatever the merits of a fundamental modification of Article V, we regard consideration of such a proposal as beyond the scope of our study. In short, we take the present text of Article V as the foundation for our study.

It is the view of our Committee that it is desirable for Congress to establish procedures for amending the Constitution by the national constitutional convention method. We recognize that some believe that it is unfortunate to focus attention on this method of amendment and unwise to establish procedures which might facilitate the calling of a convention. The argument is that the establishment of procedures might make it easier for state legislatures to seek a national convention, and might even encourage them to do so.[13] Underlying this argument is the belief that, at least in modern political terms, a national convention would venture into uncharted and dangerous waters. It is relevant to note in this respect that a similar concern has been expressed about state constitutional conventions but that 184 years' experience at that level furnishes little support to the concern.[14]

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We are not persuaded by these suggestions that we should fail to deal with the convention method, hoping that the difficult questions never arise. More than 300 applications during our constitutional history, with every state legislature represented, stand as testimony that a consideration of procedure is not purely academic. Indeed, we would ignore at great peril the lessons of the recent proposals for a convention on legislative apportionment (the one-person, one-vote issue) where, if one more state had requested a convention, a major struggle would have ensued on the adequacy of the requests and on the nature of the convention and the rules therefor.

If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance. In addition to being better governmental technique, a forthright approach to the dangers of the convention method seems far more likely to yield beneficial results than would burying our heads in the sands of uncertainty. Essentially, the reasons are the same ones which caused the American Bar Association to urge, and our nation ultimately to adopt, the rules for dealing with the problems of presidential disability and a vice-presidential vacancy which are contained in the Twenty-Fifth Amendment. So long as the Constitution envisions the convention method, we think the procedures should be ready if there is a "contemporaneously felt need" by the required two-thirds of the state legislatures. Fidelity to democratic principles requires no less.

The observation that one Congress may not bind a subsequent Congress does not persuade us that comprehensive legislation is useless or impractical. The interests of the public and nation are better served when safeguards and rules are prescribed in advance. Congress itself has recognized this in many areas, including its adoption of and sub-

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sequent reliance on legislative procedures for handling such matters as presidential electoral vote disputes and contested elections for the House of Representatives.[15] Congressional legislation fashioned after intensive study, and in an atmosphere free from the emotion and politics that undoubtedly would surround a specific attempt to energize the convention process, would be entitled to great weight as a constitutional interpretation and be of considerable precedential value. Additionally, whenever two-thirds of the state legislatures had applied for a convention, it would help to focus and channel the ensuing discussion and identify the expectations of the community.

In our view any legislation implementing Article V should reflect its underlying policy, as articulated by Madison, of guarding "equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."[16] Legislation should protect the integrity of the amending process and assure public confidence in its workings.

Specific

It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject matter on which the legislatures of two-thirds of the states request a convention. In establishing procedures for making available to the states a limited convention when they petition for such a convention, Congress must not prohibit the state legislatures from requesting a general convention since, as we view it, Article V permits both types of conventions (pp. 11-19 *infra*).

We consider Congress' duty to call a convention whenever two-thirds of the state legislatures have concurred on the subject matter of the convention to be mandatory (p. 17).

We believe that the Constitution does not assign the President a role in either the call of a convention or the ratification of a proposed amendment (pp. 25-28).

We consider it essential that legislation passed by Congress to implement the convention method should provide for limited judicial review of congressional action or inaction concerning a consti-

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tutional convention. Provision for such review not only would enhance the legitimacy of the process but would seem particularly appropriate since, when and if the process were resorted to, it likely would be against the backdrop of some dissatisfaction with prior congressional performance (pp. 20-25).

We deem it of fundamental importance that delegates to a convention be elected and that representation at the convention be in conformity with the principles of representative democracy as enunciated by the "one-person, one-vote" decisions of the Supreme Court (pp. 33-37). One member of the Committee, however, does not believe that the one-person, one-vote rule is applicable to a constitutional convention.

We believe also that a convention should adopt its own rules of procedure, including the vote margin necessary at the convention to propose an amendment to the Constitution (pp. 19-20).

Our research and deliberations have led us to conclude that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment (pp. 28-30).*

Finally, we believe it highly desirable for any legislation implementing the convention method of Article V to include the rule that a state legislature can withdraw an application at any time before the legislatures of two-thirds of the states have submitted applications on the same subject, or withdraw a vote rejecting a proposed amendment, or rescind a vote ratifying a proposed amendment so long as three-fourths of the states have not ratified (pp. 32-33, 37-38).

*We, of course, are referring to a substantive role and not a role such as the agency for the transmittal of applications to Congress, or for receipt of proposed amendments for submission to the state legislature, or for the certification of the act of ratification in the state.

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Authority of an Article V Convention

Central to any discussion of the convention method of initiating amendments is whether a convention convened under Article V can be limited in its authority. There is the view, with which we disagree, that an Article V convention would be a sovereign assemblage and could not be restricted by either the state legislatures or the Congress in its authority or proposals. And there is the view, with which we agree, that Congress has the power to establish procedures which would limit a convention's authority to a specific subject matter where the legislatures of two-thirds of the states seek a convention limited to that subject.

The text of Article V demonstrates that a substantial national consensus must be present in order to adopt a constitutional amendment. The necessity for a consensus is underscored by the requirement of a two-thirds vote in each House of Congress or applications for a convention from two-thirds of the state legislatures to initiate an amendment, and by the requirement of ratification by three-fourths of the states. From the language of Article V we are led to the conclusion that there must be a consensus among the state legislatures as to the subject matter of a convention before Congress is required to call one. To read Article V as requiring such agreement helps assure "that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today . . . ."[17]

The origins and history of Article V indicate that both general and limited conventions were within the contemplation of the Framers. The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing

with the congressional method. As Madison observed: Article V "equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[18] The "state" method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution 13 "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[19] A number of suggestions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787:

> "On the application of the Legislatures of two thirds of the States in the Union, for *an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*"[20]

This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention "whenever it pleased" was not accepted. There is reason to believe that the convention contemplated under this proposal "was the last step in the amending process, and its decisions did not require any ratification by anybody."[21]

On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether." His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that "an easy mode should be established for supplying defects which will probably appear in the new System."[22] He felt that Congress would be "the first to perceive" and be "most sensible to the necessity of Amend-

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ments," and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression "call a convention for the purpose" was sufficient reason for reconsideration. He then asked: "How was a Convention to be formed? by what rule decide? what the force of its acts?" As a result of the debate, the clause adopted on August 30 was dropped in favor of the following provision proposed by Madison:

> "The Legislature of the U-S- whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S."[23]

On September 15, after the Committee of Style had returned its report, George Mason strongly objected to the amending article on the ground that both modes of initiating amendments depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive ...."* Gerry and Gouverneur Morris then moved to amend the article "so as to require a convention on application of" two-thirds of the states.[24] In response Madison said that he "did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application." He added that he had no objection against providing for a convention for the purpose of amendments "except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."[25]

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*Mason's draft of the Constitution, as it stood at that point in the Convention, contained the following notations: "Article 5th – By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 The Records of the Federal Convention of 1787, at 629 n. 8 (Farrand ed. 1937)

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Thereupon, the motion by Morris and Gerry was agreed to and the amending article was thereby modified so as to include the convention method as it now reads. Morris then successfully moved to include in Article V the proviso that "no state, without its consent shall be deprived of its equal suffrage in the Senate."

There was little discussion of Article V in the state ratifying conventions. In *The Federalist* Alexander Hamilton spoke of Article V as contemplating "a single proposition." Whenever two-thirds of the states concur, he declared, Congress would be obliged to call a convention. "The words of this article are peremptory. The Congress 'shall call a convention'. Nothing in this particular is left to the discretion of that body."[26] Madison, as noted earlier, stated in *The Federalist* that both the general and state governments are equally enabled to "originate the amendment of errors."

While the Constitutional Convention of 1787 may have exceeded the purpose of its call in framing the Constitution,* it does not follow that a convention convened under Article V and subject to the Constitution can lawfully assume such authority. In the first place, the Convention of 1787 took place during an extraordinary period and at a time when the states were independent and there was no effective national government. Thomas Cooley described it as "a revolutionary proceeding, and could be justified only by the circumstances which had brought the Union to the brink of dissolution."[27] Moreover, the Convention of 1787 did not ignore Congress. The draft Constitution was submitted to Congress, consented to by Congress, and transmitted by Congress to the states for ratification by popularly-elected conventions.

Both pre-1787 convention practices and the general tenor of the amending provisions of the first state constitutions lend support to the conclusions that a convention could be convened for a specific purpose and that, once convened, it would have no authority to exceed that purpose.

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*This is because it was called "for the sole and express purpose of revising the Articles of Confederation and reporting . . . such alterations and provisions therein as shall . . . render the federal constitution adequate to the exigencies of government and the preservation of the Union."

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Of the first state constitutions, four provided for amendment by conventions and three by other methods.[28] Georgia's Constitution provided that

> "no alteration shall be made in this constitution without petitions from a majority of the counties, . . . at which time the assembly shall order a *convention to be called for that purpose,** specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid."[29]

Pennsylvania's Constitution of 1776 provided for the election of a Council of Censors with power to call a convention

> "if there appear to them an absolute necessity of amending any article of the constitution which may be defective .... But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[30]

The Massachusetts Constitution of 1780 directed the General Court to have the qualified voters of the respective towns and plantations convened in 1795 to collect their sentiments on the necessity or expediency of amendments. If two-thirds of the qualified voters throughout the state favored "revision or amendment," it was provided that a convention of delegates would meet "for the purpose aforesaid."

The report of the Annapolis Convention of 1786 also reflected an awareness of the binding effect of limitations on a convention. That Convention assembled to consider general trade matters and, because of the limited number of state representatives present, decided not to proceed, stating:

> "That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstances of so partial and defective a representation."[31]

In their report, the Commissioners expressed the opinion that there should be another convention, to consider not only trade matters but the

*Note the similarity between this language (emphasis ours) and the language contained in the earliest drafts of Article V (p. 12, *supra*).

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amendment of the Articles of Confederation. The limited authority of the Annapolis Commissioners, however, was made clear:

> "If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.
>
> * * *
>
> "Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States."

From this history of the origins of the amending provision, we are led to conclude that there is no justification for the view that Article V sanctions only general conventions. Such an interpretation would relegate the alternative method to an "unequal" method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution.

Since Article V specifically and exclusively vests the state legislatures with the authority to apply for a convention, we can perceive no sound reason as to why they cannot invoke limitations in exercising that authority. At the state level, for example, it seems settled that the electorate may choose to delegate only a portion of its authority to a state constitutional convention and so limit it substantively.[32] The rationale is that the state convention derives its authority from the people when they vote to hold a convention and that when they so vote they adopt the limitations on the convention contained in the enabling legislation drafted by the legislature and presented on a "take it or leave it" basis.[33] As one state court decision stated:

> "When the people, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention, they are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention."[34]

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And another:

> "Certainly, the people, may, if they will, elect delegates for a particular purpose without conferring on them all their authority . . . ."[35]

In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amending article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limted convention;[36] and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates.

Power of Congress with Respect to an Article V Convention

Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the state legislatures and to choose the mode of ratification of a proposed amendment. We believe that, as a necessary incident of the power to call, Congress has the power initially to determine whether the conditions which give rise to its duty have been satisfied. Once a determination is made that the conditions are present, Congress' duty is clear—it "shall" call a convention. The language of Article V, the debates at the Constitutional Convention of 1787, and statements made in *The Federalist,* in the debates in the state ratifying conventions, and in congressional debates during the early Congresses make clear the mandatory nature of this duty.*

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*Upon receipt of the *first* state application for a convention, a debate took place in the House of Representatives on May 5, 1789, as to whether it would be proper to refer that application to committee. A number of Representatives, including Madison, felt it would be improper to do so, since it would imply that Congress had a right to deliberate upon the subject. Madison said that this "was not the case until two-thirds of the State Legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of

While we believe that Congress has the power to establish standards for making available to the states a limited convention when they petition for that type of convention, we consider it essential that implementing legislation not preclude the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention.

In formulating standards for determining whether a convention call should issue, there is a need for great delicacy. The standards not only will determine the call but they also will have the effect of defining the convention's authority and determining whether Congress must submit a proposed amendment to the states for ratification. The standards chosen should be precise enough to permit a judgment that two-thirds of the state legislatures seek a convention on an agreed-upon matter. Our research of possible standards has not produced any alternatives which we feel are preferable to the "same subject" test embodied in S.1272. We do feel, however, that the language of Sections 4, 5, 6, 10 and 11 of S.1272 is in need of improvement and harmonization so as to avoid the use of different expressions and concepts.

We believe that standards which in effect required applications to be identical in wording would be improper since they would tend to make resort to the convention process exceedingly difficult in view of the problems that would be encountered in obtaining identically worded applications from thirty-four states. Equally improper, we believe, would be standards which permitted Congress to

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applications of this nature." The House thus decided not to refer the application to committee but rather to enter it upon the Journals of Congress and place the original in its files. 1 Annals of Congress, cols. 248-51 (1789). Further support for the proposition that Congress has no discretion on whether or not to call a constitutional convention, once two-thirds of the states have applied for one, may be found in IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 178 (2d ed 1836) (remarks of delegate James Iredell of North Carolina); 1 Annals of Congress, col. 498 (1796) (remarks of Rep. William Smith of South Carolina during debate on a proposed treaty with Great Britain); Cong. Globe, 38th Cong., 2d Sess. 630-31 (1865) (remarks of Senator Johnson).

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exercise a policy-making role in determining whether or not to call a convention.*

In addition to the power to adopt standards for determining when a convention call should issue, we also believe it a fair inference from the text of Article V that Congress has the power to provide for such matters as the time and place of the convention, the composition and financing of the convention, and the manner of selecting delegates. Some of these items can only be fixed by Congress. Uniform federal legislation covering all is desirable in order to produce an effective convention.

Less clear is Congress' power over the internal rules and procedures of a convention.+ The Supreme Court's decisions in *Dillon* v. *Gloss*[37] and *Leser* v. *Garnett*[38] can be viewed as supporting a broad view of Congress' power in the amending process. As the Court stated in *Dillon* v. *Gloss*: "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule." On the other hand, the legislative history of Article V reflects a purpose that the convention method be as free as possible from congressional domination, and the text of Article V grants Congress only two express powers pertaining to a convention, that is, the power (or duty) to call a convention and the power to choose the mode of ratification of any proposed amendment. In the absence of direct precedents, it perhaps can be said fairly that Congress may not by legislation interfere with matters of procedure because they are an intrinsic part of the deliberative characteristic of a convention.[39] We view as unwise and of questionable validity any attempt by Congress to regulate the internal proceedings of a convention. In particular, we believe that Congress should not impose a vote

*See our discussion at pages 30-31, *infra*.

+For a related discussion, see the debates which took place at the time the Twenty-First Amendment was being formulated concerning the extent of congressional power over state ratifying conventions. *See, e.g.*, 76 Cong. Rec. 124-34, 2419-21, 4152-55 (1933); 77 Cong. Rec. 481-82 (1933); 81 Cong. Rec. 3175-76 (1937). Former Attorney General A. Mitchell Palmer argued that Congress could legislate all the necessary provisions for the assembly and conduct of such conventions, a view that was controverted at the time by former Solicitor General James M. Beck.

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requirement on an Article V convention. We are influenced in this regard by these factors:

First, it appears from our research that throughout our history conventions generally have decided for themselves the vote that should govern their proceedings. This includes the Constitutional Convention of 1787, the constitutional conventions that took place between 1776 and 1787, many of the approximately two hundred state constitutional conventions that have been held since 1789, and the various territorial conventions that have taken place under acts passed by Congress.[40] Second, the specific intent of the Framers with regard to the convention method of initiating amendments was to make available an alternative method of amending the Constitution—one that would be free from congressional domination. Third, a reading of the 1787 debates suggests that the Framers contemplated that an Article V convention would have the power to determine its own voting and other internal procedures and that the requirement of ratification by three-fourths of the states was intended to protect minority interests.[41]

We have considered the suggestion that Congress should be able to require a two-thirds vote in order to maintain the symmetry between the convention and congressional methods of initiating amendments. We recognize that the convention can be viewed as paralleling Congress as the proposing body. Yet we think it is significant that the Constitution, while it specifies a two-thirds vote by Congress to propose an amendment, is completely silent as to the convention vote.

Judicial Review

The Committee believes that judicial review of decisions made under Article V is desirable and feasible. We believe Congress should declare itself in favor of such review in any legislation implementing the convention process. We regard as very unwise the approach of S.1272 which attempts to exclude the courts from any role. While the Supreme Court's decision in *Ex parte McCardle*[42] indicated that Congress has power under Article III to withdraw matters from the jurisdiction of the federal courts, this power is not unlimited. It is questionable whether the power reaches so far as to permit Congress to change

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results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction.[43]

To be sure, Congress has discretion in interpreting Article V and in adopting implementing legislation. It cannot be gainsaid that Congress has the primary power of administering Article V. We do not believe, however, that Congress is, or ought to be, the final dispositive power in every situation. In this regard, it is to be noted that the courts have adjudicated on the merits a variety of questions arising under the amending article. These have included such questions as: whether Congress may choose the state legislative method of ratification for proposed amendments which expand federal power; whether a proposed amendment requires the approval of the President; whether Congress may fix a reasonable time for ratification of a proposed amendment by state legislatures; whether the states may restrict the power of their legislatures to ratify amendments or submit the decision to a popular referendum; and the meaning of the requirement of a two-thirds vote of both Houses.[44]

Baker v. *Carr* and *Powell* v. *McCormack* suggest considerable change in the Supreme Court's view since *Coleman* v. *Miller*[45] on questions involving the political process.

In *Coleman*, the Court held that a group of state legislators who had voted not to ratify the child labor amendment had standing to question the validity of their state's ratification. Four Justices dissented on this point. The Court held two questions non-justiciable: the issue of undue time lapse for ratification and the power of a state legislature to ratify after having first rejected ratification. In reaching these conclusions, the Court pointed to the absence of criteria either in the Constitution or a statute relating to the ratification process. The four Justices who dissented on standing concurred on non-justiciability. They felt, however, that the Court should have disapproved *Dillon* v. *Gloss* insofar as it decided judicially that seven years is a reasonable period of time for ratification, stating that Article V gave control of the amending process to Congress and

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that the process was "political in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Even though the calling of a convention is not precisely within these time limits and the holding in *Coleman* is not broad, it is not at all surprising that commentators read that case as bringing Article V issues generally within the rubric of "political questions."

In *Baker* v. *Carr*,[46] the Court held that a claim of legislative malapportionment raised a justiciable question. More generally, the Court laid down a number of criteria, at least one of which was likely to be involved in a true "political question," as follows:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question."[47]

Along with these formulas, there was additional stress in *Baker* v. *Carr* on the fact that the Court there was not dealing with Congress, a coordinate branch, but with the states. In reviewing the precedents, the Court noted that it had held issues to be nonjusticiable when the matter demanded a single-voiced statement, or required prompt, unquestioning obedience, as in a national emergency, or contained the potential embarrassment of sitting in judgment on the internal operations of a coordinate branch.

Perhaps the most striking feature of *Baker* and its progeny has been the Court's willingness to project itself into redistricting and reapportionment in giving relief. In addition, some of the criteria stressed by the Court as determinative of "political question" issues were as applicable to Congress as to the states.

In *Powell*,[48] the Court clearly marked out new ground. The question presented was the constitutionality of the House of Representatives' decision

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to deny a seat to Congressman-elect Powell, despite his having fulfilled the prerequisites specified in Article I, Section 2 of the Constitution. Even though it was dealing with Congress, and indeed with a matter of internal legislative operation, still it held that the question was a justiciable one, involving as it did the traditional judicial function of interpreting the Constitution, and that a newly elected Representative could be judged as to qualifications only as to age, citizenship, and residence. The Court limited itself to declaratory relief, saying that the question of whether coercive relief was available against employees of Congress was not being decided. But the more important aspect of the decision is the Court's willingness to decide. It stressed the interest of voters in having the person they elect take a seat in Congress. Thus, it looked into the clause on qualifications and found in the text and history that Congress was the judge of qualifications, but only of the three specified.

It is not easy to say just how these precedents apply to judicial review of questions involving a constitutional convention under Article V. It can be argued that they give three different doctrinal models, each leading to a different set of conclusions. We are inclined to a view which seeks to reconcile the three cases. *Powell* may be explained on the theory that specially protected constitutional interests are at stake, that the criteria for decisions were rather simple, and that an appropriate basis for relief could be found. *Baker* is more complex, but it did not involve Congress directly. The state legislatures had forfeited a right to finality by persistent and flagrant malapportionments, and one person, one vote supplied a judicially workable standard (though the latter point emerged after *Baker*). Thus, *Coleman* may be understood as good law so far as it goes, on the theory that Congress is directly involved, that no specially protected interests are threatened, and that the issues are not easily dealt with by the Court.

Following this approach to the three cases, some tentative conclusions can be drawn for Article V and constitutional conventions. If two-thirds of the state legislatures apply, for example, for a convention to consider the apportionment of state legisla-

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tures, and Congress refuses to call the convention, it is arguable that a *Powell* situation exists, since the purpose of the convention method was to enable the states to bring about a change in the Constitution even against congressional opposition. The question whether Congress is required to act, rather than having discretion to decide, is one very similar in quality to the question in *Powell*. The difficulty not confronted in *Powell* is that the relief given must probably be far-reaching, possibly involving the Court in approving a plan for a convention. There are at least two answers. The Court might find a way to limit itself to a declaratory judgment, as it did in *Powell*, but if it must face far-reaching relief, the reapportionment cases afford a precedent. In some ways, a plan for a convention would present great difficulties for a court, but it could make clear that Congress could change its plan, simply by acting.[49]

If one concludes that the courts can require Congress to act, one is likely to see the courts as able to answer certain anciilary questions of "law," such as whether the state legislatures can bind a convention by the limitations in their applications, and whether the state legislatures can force the call of an unlimited convention. Here we believe Congress has a legislative power, within limits, to declare the effects of the states' applications on the scope of the convention. Courts should recognize that power and vary their review according to whether Congress has acted.

Consequently, this Committee strongly favors the introduction in any implementing legislation of a limited judicial review.* It would not only add substantial legitimacy to any use of the convention process but it would ease the question of justiciability. Moreover, since the process likely would be resorted to in order to effect a change opposed by vested interests, it seems highly appropriate that our independent judiciary be involved so that it can act, if necessary, as the arbiter.

In view of the nature of the controversies that might arise under Article V, the Committee believes that there should be several limits on judicial

Appendix A sets forth suggestions as to how such review might be provided for in S.1272.

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consideration. First, a Congressional determination should be overturned only if "clearly erroneous." This standard recognizes Congress' political role and at the same time insures that Congress cannot arbitrarily void the convention process.

Second, by limiting judicial remedies to declaratory relief, the possibility of actual conflict between the branches of government would be diminished. As *Powell* illustrated, courts are more willing to adjudicate questions with "political" overtones when not faced with the institutionally destructive need to enforce the result.

Third, the introduction of judicial review should not be allowed to delay the amending process unduly. Accordingly, any claim should be raised promptly so as to result in an early presentation and resolution of any dispute. We favor a short limitation period combined with expedited judicial procedures such as the selection of a three-judge district court. The possibility of providing original jurisdiction in the Supreme Court was rejected for several reasons. Initiation of suit in the Supreme Court necessarily escalates the level of the controversy without regard to the significance of the basic dispute. In addition, three-judge district court procedures are better suited to an expedited handling of factual issues.

We do not believe that our recommendation of a three-judge court is inconsistent with the American Bar Association's position that the jurisdiction of such courts should be sharply curtailed. It seems likely that the judicial review provided for will occur relatively rarely. In those instances when it does, the advantages of three-judge court jurisdiction outweigh the disadvantages which the Association has perceived in the existing three-judge court jurisdiction. In cases involving national constitutional convention issues, the presence of three judges (including a circuit judge) and the direct appeal to the Supreme Court are significant advantages over conventional district court procedure.

Role of Executive (i) President

There is no indication from the text of Article V that the President is assigned a role in the amending process. Article V provides that "Congress" shall propose amendments, call a convention for proposing amendments and, in either case, choose the mode for ratification of amendments.

Article I, Section 7 of the Constitution, however, provides that "every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President" for his approval and, if disapproved, may be repassed by a two-thirds vote of both Houses.

It has, we believe, been regarded as settled that amendments proposed by Congress need not be presented to the President for his approval. The practice originated with the first ten amendments, which were not submitted to President Washington for his approval, and has continued through the recently proposed amendment on equality of rights. The question of whether the President's approval is required was passed on by the Supreme Court in *Hollingsworth* v. *Virginia*.[50] There, the validity of the Eleventh Amendment was attacked on the ground that it had "not been proposed in the form prescribed by the Constitution" in that it had never been presented to the President. Article I, Section 7 was relied upon in support of that position. The Attorney General argued that the proposing of amendments was "a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the President with a qualified negative on the Acts and Resolutions of Congress." It was also urged that since a two-thirds vote was necessary for both proposing an amendment and overriding a presidential veto, no useful purpose would be served by a submission to the President in such case. It was argued in reply that this was no answer, since the reasons assigned by the President for his disapproval "might be so satisfactory as to reduce the majority below the constitutional proportion." The Court held that the amendment had been properly adopted, Justice Chase stating that "the negative of the President applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution."[51] What was not pointed out, but could have been, is that had the President's approval been found necessary, it would have created the anomaly that only amendments proposed by Congress would be subject to the requirements inasmuch as Article I, Section 7 by

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its terms could not apply to action taken by a national constitutional convention.

Subsequent to *Hollingsworth,* the question of the President's role in the amending process has been the subject of discussion in Congress. In 1803 a motion in the Senate to submit the Twelfth Amendment to the President was defeated.[52] In 1865 the proposed Thirteenth Amendment was submitted to President Lincoln and, apparently through an inadvertence, was signed by him. An extensive discussion of his action took place in the Senate and a resolution was passed declaring that the President's signature was unnecessary, inconsistent with former practice, and should not constitute a precedent for the future.[53] The following year President Andrew Johnson, in a report to the Congress with respect to the Fourteenth Amendment, made clear that the steps taken by the Executive Branch in submitting the amendment to the state legislatures was "purely ministerial" and did not commit the Executive to "an approval or a recommendation of the amendment."[54] Since that time, no proposed amendment has been submitted to the President for his approval and no serious question has arisen over the validity of amendments for that reason. Thus, the Supreme Court could state in 1920 in *Hawke* v. *Smith* that it was settled "that the submission of a constitutional amendment did not require the action of the President."

While the "call" of a convention is obviously a different step from that of proposing an amendment, we do not believe that the President's approval is required. Under Article V applications from two-thirds of the state legislatures must precede a call and, as previously noted, Congress' duty to issue a call once the conditions have been met clearly seems to be a mandatory one. To require the President's approval of a convention call, therefore, would add a requirement not intended. Not only would it be inconsistent with the mandatory nature of Congress' duty and the practice of non-presidential involvement in the congressional process of initiating amendments but it would make more difficult any resort to the convention method. The approval of another branch of government would be necessary and, if

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not obtained, a two-thirds vote of each House would be required before a call could issue. Certainly, the parallelism between the two initiating methods would be altered, in a manner that could only thwart the intended purpose of the convention process as an "equal" method of initiating amendments.

While the language of Article I, Section 7 expressly provides for only one exception (*i.e.*, an adjournment vote), it has been interpreted as not requiring presidential approval of preliminary votes in Congress, or, as noted, the proposal of constitutional amendments by Congress, or concurrent resolutions passed by the Senate and the House of Representatives for a variety of purposes.* As the Supreme Court held in *Hollingsworth,* Section 7 applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." Thus, the use of a concurrent resolution by Congress for the issuance of a convention call is in our opinion in harmony with the generally recognized exceptions to Article I, Section 7.

(ii) State Governor

We believe that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment. In reaching this conclusion, we are influenced by the fact that Article V speaks of "state legislatures" applying for a convention and ratifying an amendment proposed by either Congress or a national convention. The Supreme Court had occasion to focus on this expression in *Hawke*

*The concurrent resolution is used to express "the sense of Congress upon a given subject," Watkins, C.L., & Riddick, F.M., *Senate Procedure: Precedents and Practices* 208 (1964); to express "facts, principles, opinions, and purposes of the two Houses," Deschler, L., *Jefferson's Manual and Rules of the House of Representatives* 185-186 (1969); and to take a joint action embodying a matter within the limited scope of Congress, as, for instance, to count the electoral votes, terminate the effective date of some laws, and recall bills from the President, Evins, Joe L., *Understanding Congress* 114 (1963); Watkins and Riddick, *supra* at 208-9. A concurrent resolution was also used by Congress in declaring that the Fourteenth Amendment should be promulgated as part of the Constitution. 15 Stat. 709-10. Other uses include terminating powers delegated to the President, directing the expenditure of money appropriated to the use of Congress, and preventing reorganization plans taking effect under general powers granted the President to reorganize executive agencies. For an excellent discussion of such resolutions, see S. Rep. No. 1335, 54th Cong., 2d Sess. (1897).

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v. *Smith*[55] (*No. 1*) in the context of a provision in the Ohio Constitution subjecting to a popular referendum any ratification of a federal amendment by its legislature. The Court held that this requirement was invalid, reasoning that the term "legislatures" had a certain meaning. Said the Court: "What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people."[56] The ratification of a proposed amendment, held the Court, was not "an act of legislation within the proper sense of the word" but simply an expression of assent in which "no legislative action is authorized or required." The Court also noted that the power to ratify proposed amendments has its source in the Constitution and, as such, the state law-making procedures are inapplicable.

That the term "Legislature" does not always mean the representative body itself was made clear by *Smiley* v. *Holm.*[57] That case involved a bill passed by the Minnesota legislature dividing the state into congressional districts under Article I, Section 4. The bill was vetoed by the governor and not repassed over his veto. As for the argument that the bill was valid because Article I, Section 4 refers to the state "Legislatures," the Court stated:

> "The use in the Federal Constitution of the same term in different relations does not always imply the same function . . . . Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view . . . ."[58]

The Court found that the governor's participation was required because the function in question involved the making of state laws and the veto of the governor was an integral part of the state's legislative process. In finding that Article I, Section 4 contemplated the making of laws, the Court stated that it provided for "a complete code for congressional elections" whose requirements "would be nugatory if they did not have appropriate sanctions." The Court contrasted this function with the "Legislature's" role as an electoral body, as when it chose Senators, and a ratifying body, as in the case of federal amendments.

It is hard to see how the act of applying for a convention invokes the law-making processes of the state any more than its act of ratifying a

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proposed amendment. If anything, the act of ratification is closer to legislation since it is the last step before an amendment becomes a fundamental part of our law. A convention application, on the other hand, is several steps removed. Other states must concur, a convention them must be called by Congress, and an amendment must be proposed by that convention. Moreover, a convention application, unlike legislation dividing congressional districts, does not have the force of law or operate directly and immediately upon the people of the state. From a legal point of view, it would seem to be contrary to *Hawke* v. *Smith* and *Leser* v. *Garnett* to require the governor's participation in the application and ratification processes.[59]

The exclusion of the governor from the application and ratification processes also finds support in the overwhelming practice of the states,[60] in the views of text-writers,[61] and in the Supreme Court's decision in *Hollingsworth* v. *Virginia* holding that the President was excluded from any role in the process by which amendments are proposed by Congress.[62]

Article V Applications (i) Content

A reading of Article V makes clear that an application should contain a request to Congress to call a national convention that would have the authority to propose an amendment to the Constitution. An application which simply expressed a state's opinion on a given problem or requested Congress itself to propose an amendment would not be sufficient for purposes of Article V. Nor would an application seem proper if it called for a convention with no more authority than to vote a specific amendment set forth therein up or down, since the convention would be effectively stripped of its deliberative function.* A convention should have latitude to amend, as Congress does, by evaluating and dealing with a problem.

On the other hand, an application which expressed the result sought by an amendment, such as providing for the direct election of the President, should be proper since the convention itself would be left free to decide on the terms of the specific

*In commenting on the ratification process, the Supreme Court stated in *Hawke* v. *Smith (No. 1)*. "Both methods of ratification, by legislatures or conventions, *call for action by deliberative assemblages* representative of the people, which it was assumed would voice the will of the people." 253 U.S. at 226-27 (emphasis added).

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amendment necessary to accomplish that objective. We agree with the suggestion that it should not be necessary that each application be identical or propose similar changes in the same subject matter.[63]

In order to determine whether the requisite agreement among the states is present, it would seem useful for congressional legislation to require a state legislature to list in its application all state applications in effect on the date of its adoption whose subject or subjects it considers to be substantially the same. By requiring a state legislature to express the purpose of its application in relation to those already received, Congress would have additional guidance in rendering its determination. Any such requirement, we believe, should be written in a way that would permit an application to be counted even though the state involved might have inadvertently but in good faith failed to identify similar applications in effect.

(ii) Timeliness

In *Dillon* v. *Gloss,* the Court upheld the fixing by Congress of a period during which ratification of a proposed amendment must be accomplished. In reaching that conclusion the Court stated that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix." The Court observed that

> "as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[64]

We believe the reasoning of *Dillon* v. *Gloss* to be equally applicable to state applications for a national constitutional convention. The convening of a convention to deal with a certain matter certainly should reflect the "will of the people in all sections at relatively the same period . . . ." In the absence of a uniform rule, the timeliness or untimeliness of state applications would vary, it seems, from case to case. It would involve, as the Supreme Court suggested with respect to the ratification area in *Coleman* v. *Miller,* a consideration of "political, social and economic conditions

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which have prevailed during the period since the submission of the [applications] . . . ."[65]

A uniform rule, as in the case of ratification of proposed amendments since 1918,[66] would add certainty and avoid the type of confusion which surrounded the apportionment applications. Any rule adopted, however, must take into account the fact that some state legislatures do not meet every year and that in many states the legislative sessions end early in the year.

Although the suggestion of a seven year period is consistent with that prescribed for the ratification of recent proposed constitutional amendments, it can be argued that such a period is too long for the calling of a constitutional convention, since a long series of years would likely be involved before an amendment could be adopted. A shorter period of time might more accurately reflect the will of the people at a given point in time. Moreover, at this time in our history when social, economic and political changes frequently occur, a long period of time might be undesirable. On the other hand, a period such as four years would give states which adopted an application in the third and fourth year little opportunity to withdraw it on the basis of further reflection. This is emphasized when consideration is given to the fact that a number of state legislatures do not meet every year. Hence, a longer period does afford more opportunity for reflection on both the submission and withdrawal of an application. It also enables the people at the time of state legislative elections to express their views. Of course, whatever the period it may be extended by the filing of a new proposal.

The Committee feels that some limitation is necessary and desirable but takes no position on the exact time except it believes that either four or seven years would be reasonable and that a congressional determination as to either period should be accepted.

(iii) Withdrawal of Applications

There is no law dealing squarely with the question of whether a state may withdraw an application seeking a constitutional convention, although some commentators have suggested that a withdrawal is of no effect.[67] The desirability of having a rule on the subject is underscored by the fact that state legislatures have attempted to withdraw applica-

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tions, particularly during the two most recent cases where a large number of state legislatures sought a convention on a specific issue.* As a result, uncertainty and confusion have arisen as to the proper treatment of such applications.

During the Senate debates of October 1971 on S.215, no one suggested any limitation on the power to withdraw up to the time that the legislatures of two-thirds of the states had submitted proposals. Since a convention should reflect a "contemporaneously-felt need" that it take place, we think there should be no such limitation. In view of the importance and comparatively permanent nature of an amendment, it seems desirable that state legislatures be able to set aside applications that may have been hastily submitted or that no longer reflect the social, economic and political factors in effect when the applications were originally adopted. We believe Congress has the power to so provide.

From a slightly different point of view, the power to withdraw implies the power to change and this relates directly to the question of determining whether two-thirds of the state legislatures have applied for a convention to consider the same subject. A state may wish to say specifically through its legislature that it does or does not agree that its proposal covers the same subject as that of other state proposals. The Committee feels that this power is desirable.

Finally, we can see no problem with respect to a state changing a refusal to request a convention to a proposal for such a convention. All states, of course, have rules of one sort or another which restrict the time at which a once-defeated proposition can be again presented. If these rules were to apply to the call of a federal convention and operate in a burdensome manner, their validity would be questionable under *Hawke* v. *Smith.*

The Article V Convention

(i) Election of Delegates

We believe it of fundamental importance that a constitutional convention be representative of the people of the country. This is especially so when it is borne in mind that the method was intended to make available to the "people" a means of remedying abuses by the national government. If the

*That is, the reapportionment and tax limitation applications.

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convention is to be "responsive" to the people, then the structure most appropriate to the convention is one representative of the people. This, we believe, can only mean an election of convention delegates by the people. An election would help assure public confidence in the convention process by generating a discussion of the constitutional change sought and affording the people the opportunity to express themselves to the future delegates.

(ii) Apportionment of Delegates

Although there are no direct precedents in point, there is authority and substantial reason for concluding, as we do, that the one-person, one-vote rule is applicable to a national constitutional convention. In *Hadley* v. *Junior College District*, the Supreme Court held that the rule applied in the selection of people who carry on governmental functions.[68] While a recent decision, affirmed without opinion by the Supreme Court, held that elections for the judiciary are exempt from the rule, the lower court stated that "judges do not represent people."[69] Convention delegates, however, would represent people as well as perform a fundamental governmental function. As a West Virginia Supreme Court observed with respect to a state constitutional convention: "[E]ven though a constitutional convention may not precisely fit into one of the three branches of government, it is such an essential incident of government that every citizen should be entitled to equal representation therein."[70] Other decisions involving conventions differ as to whether the apportionment of a state constitutional convention must meet constitutional standards.[71]

Of course, the state reapportionment decisions are grounded in the equal protection clause of the Fourteenth Amendment and the congressional decision in *Wesberry* v. *Sanders*[72] was founded on Article I, Section 2. Federal legislation providing for a national constitutional convention would be subject to neither of these clauses but rather to the Fifth Amendment. Yet the concept of equal protection is obviously related to due process and has been so reflected in decisions under the Fifth Amendment.[73]

Assuming compliance with the one-person, one-vote rule is necessary, as we believe it is, what

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standards would apply? While the early cases spoke in terms of strict population equality, recent cases have accepted deviations from this standard. In *Mahan* v. *Howell*, the Supreme Court accepted deviations of up to 16.4% because the state apportionment plan was deliberately drawn to conform to existing political subdivisions which, the Court felt, formed a more natural basis for districting so as to represent the interests of the people involved.[74] In *Abate* v. *Mundt*, the Court upheld a plan for a county board of supervisors which produced a total deviation of 11.9%.[75] It did so on the basis of the long history of dual personnel in county and town government and the lack of built-in bias tending to favor a particular political interest or geographic area.

Elaborating its views on one person, one vote, the Committee believes that a system of voting by states at a convention, while patterned after the original Constitutional Convention, would be unconstitutional as well as undemocratic and archaic. While it was appropriate before the adoption of the Constitution, at a time when the states were essentially independent, there can be no justification for such a system today. Aside from the contingent election feature of our electoral college system, which has received nearly universal condemnation as being anachronistic, we are not aware of any precedent which would support such a system today. A system of voting by states would make it possible for states representing one-sixth of the population to propose a constitutional amendment. Plainly, there should be a broad representation and popular participation at any convention.

While the representation provisions of S. 1272 allowing each state as many delegates as it has Senators and Representatives in Congress are preferable to a system of voting by states, it is seriously questionable whether that structure would be found constitutional because of the great voting weight it would give to people of one state over the people of another.* It can be argued that a representation system in a convention which parallels the structure in Congress does not violate

*Use of an electoral-college-type formula would mean that 15 states would be overrepresented by 50 percent or more, with the representation rising to close to 375 percent for Alaska. California, on the other hand, would be underrepresented by nearly 20 percent.

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due process, since Congress is the only other body authorized by the Constitution to propose constitutional amendments. On the other hand, representation in the Congress and the electoral college are explicit parts of the Constitution, arrived at as a result of compromises at the Constitutional Convention of 1787. It does not necessarily follow that apportionment plans based on such models are therefore constitutional. On the contrary, the reapportionment decisions make clear that state plans which deviate from the principle of equal representation for equal numbers are unconstitutional. As the Supreme Court stated in *Kirkpatrick* v. *Preisler*:

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes."[76]

In our view, a system allotting to each state a number of delegates equal to its representation in the House of Representatives should be an acceptable compliance with one-person, one-vote standards.* We reach this conclusion recognizing that there would be population deviations of up to 50% arising from the fact that each state would be entitled to a delegate regardless of population. It would be possible to make the populations substantially equal by redistricting the entire country regardless of state boundaries or by giving Alaska one vote and having every other state elect at large a multiple of 300,000 representing its population or redistrict each state on the new population unit.[77] None of these methods, however, seems feasible or realistic. The time and expense involved in the creation and utilization of entirely new district lines for one election, especially since state election machinery is readily available, is one factor to be weighed. Another is the difficulty of creating districts crossing state lines which would adequately represent constituents from both states. There is also the natural interest of the voter in remaining within his state. Furthermore, the dual nature of our political system strongly supports the position that state boundaries be respected. *Abate*

*We have not studied the District of Columbia question, although we note that the District does not have a role in the congressional method of initiating amendments or in the ratification process.

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v. *Mundt*, although distinguishable regarding apportionment of a local legislative body, suggests an analogy on a federal level. The rationale of the Court in upholding the legislative districts within counties drawn to preserve the integrity of the towns, with the minimum deviation possible, could be applicable to apportionment of a convention. The functional interdependence and the coordination of the federal and state governments and the fundamental nature of the dual system in our government parallel the relationship between the county and towns in *Abate*. Appropriate respect for the integrity of the states would seem to justify an exception to strict equality which would assure each state at least one delegate. Thus, a system based on the allocation of Representatives in Congress would afford maximum representation within that structure.

(iii) Members of Congress as Delegates

We cannot discern any federal constitutional bar against a member of Congress serving as a delegate to a national constitutional convention. We do not believe that the provision of Article I, Section 6 prohibiting congressmen from holding offices under the United States would be held applicable to service as a convention delegate. The available precedents suggest that an "office of the United States" must be created under the appointive provisions of Article II[78] or involve duties and functions in one of the three branches of government which, if accepted by a member of Congress, would constitute an encroachment on the principle of separation of powers underlying our governmental system.[79] It is hard to see how a state-elected delegate to a national constitutional convention is within the contemplation of this provision. It is noteworthy in this regard that several delegates to the Constitutional Convention of 1787 were members of the Continental Congress and that the Articles of Confederation contained a clause similar to Article I, Section 6.

We express no position on the policy question presented, or on the applicability and validity of any state constitutional bars against members of Congress simultaneously serving in other positions.

Ratification

As part of our study, the Committee has considered the advisability of including in any statute implementing the convention method a rule as to

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whether a state should be able to rescind its ratification of a proposed amendment or withdraw a rejection vote. In view of the confusion and uncertainty which exists with respect to these matters, we believe that a uniform rule would be highly desirable.

The difficult legal and policy question is whether a state can withdraw a ratification of a proposed amendment. There is a view that Article V envisions only affirmative acts and that once the act of ratification has taken place in a state, that state has exhausted its power with respect to the amendment in question.[80] In support, it is pointed out that where the convention method of ratification is chosen, the state constitutional convention would not have the ability to withdraw its ratification after it had disbanded. Consequently, it is suggested that a state legislature does not have the power to withdraw a ratification vote. This suggestion has found support in a few state court decisions[81] and in the action of Congress declaring the ratification of the Fourteenth Amendment valid despite ratification rejections in two of the states making up the three-fourths.

On the other hand, Article V gives Congress the power to select the method of ratification and the Supreme Court has made clear that this power carries with it the power to adopt reasonable regulations with respect to the ratification process. We do not regard past precedent as controlling but rather feel that the principle of seeking an agreement of public support espoused in *Dillon* v. *Gloss* and the importance and comparatively permanent nature of an amendment more cogently argue in support of a rule permitting a state to change its position either way until three-fourths of the states have finally ratified.*[82]

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*These views of the Committee are in accord with the rule which is expressed in S.1272 and its predecessor, S.215, which was unanimously passed by the Senate in October 1971. See page 4, *supra*.

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Much of the past discussion on the convention method of initiating amendments has taken place concurrently with a lively discussion of the particular issue sought to be brought before a convention. As a result, the method itself has become clouded by uncertainty and controversy and attempted utilization of it has been viewed by some as not only an assault on the congressional method of initiating amendments but as unleashing a dangerous and radical force in our system. Our two-year study of the subject has led us to conclude that a national constitutional convention can be channeled so as not to be a force of that kind but rather an orderly mechanism of effecting constitutional change when circumstances require its use. The charge of radicalism does a disservice to the ability of the states and people to act responsibly when dealing with the Constitution.

We do not mean to suggest in any way that the congressional method of initiating amendments has not been satisfactory or, for that matter, that it is not to be preferred. We do mean to suggest that so long as the convention method of proposing amendments is a part of our Constitution, it is proper to establish procedures for its implementation and improper to place unncessary and unintended obstacles in the way of its use. As was stated by the Senate Judiciary Committee, with which we agree:

> "The committee believes that the responsibility of Congress under the Constitution is to enact legislation which makes article V meaningful. This responsibility dictates that legislation implementing the article should not be formulated with the objective of making the Convention route a dead letter by placing insurmountable procedural obstacles in its way. Nor on the other hand should Congress, in the guise of implementing

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legislation, create procedures designed to facilitate the adoption of any particular constitutional change."[83]

The integrity of our system requires that when the convention method is properly resorted to, it be allowed to function as intended.

Respectfully submitted,

SPECIAL CONSTITUTIONAL CONVENTION
STUDY COMMITTEE

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July, 1973

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[1] 2 J. Story, *Commentaries on the Constitution of the United States* § 1826 (5th ed. 1905).

[2] *The Federalist No. 43*, at 204 (Hallowell; Masters, Smith & Co. ed. 1852) (J. Madison).

[3] J. Wheeler, *The Constitutional Convention: A Manual on its Planning, Organization and Operation* xiii (National Municipal League Series 1, No. 4 1961); *see* R. Hoar, *Constitutional Conventions* 1-3 (1917).

[4] *See* A. Sturm, *Thirty Years of State Constitution Making: 1938-1968*, at 51-80, 132-37 (National Municipal League 1970).

[5] 369 U.S. 186 (1962).

[6] 377 U.S. 533 (1964).

[7] *See* Black, "The Proposed Amendment of Article V: A Threatened Disaster," 72 Yale L.J. 957 (1963); Fensterwald, "Constitutional Law: The States and the Amending Process – A Reply," 46 A.B.A.J. 717 1960); Oberst, "The Genesis of the Three States-Rights Amendments of 1963," 39 Notre Dame Lawyer 644 (1964); Shanahan, "Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations," 49 A.B.A.J. 631 (1963).

[8] *See* American Enterprise Institute, *A Convention to Amend the Constitution: Questions Involved in Calling a Convention Upon Applications by State Legislatures* (Special Analysis No. 5, 1967).

[9] *See* Martin, "The Application Clause of Article Five," 85 Pol. Sci. Q. 616, 626 (1970).

[10] Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 878 (1968).

[11] *See* Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967); S. Rep. No. 336, 92nd Cong., 1st Sess. (1971); 117 Cong. Rec. 36803-06 (1971).

[12] The literature in this field deals with various proposals to "reform" Article V by easing, restricting, or otherwise altering the means of proposing amendments to the Constitution through the convention method. *See, e.g.*, L. Orfield, *The Amending of the Federal Constitution*, Chap. VI (1942); McCleskey, "Along the Midway: Some Thoughts on Democratic Constitution-Amending," 66 Mich. L. Rev. 1001, 1012-16 (1968).

[13] On the other hand, some have suggested that state legislatures will be less likely to seek a national constitutional convention if they are more aware of the risks and uncertainties of the convention method. *See, e.g.*, Buckwalter, "Constitutional Conventions and State Legislators," 20 J. Pub. Law 543 (1971).

[14] J. Wheeler, *supra* note 3, at xv. There have been occasions on which state constitutional conventions have successfully exceeded limitations placed upon them. Conventions in Georgia (1789), Illinois (1862 and 1869), Pennsylvania (1872), Alabama (1901) and Michigan (1907) all violated legislative directives – either procedur-

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al, substantive, or both. *See* R. Hoar, *supra* note 3, at 111-115.

The Virginia Convention of 1901 and the Kentucky Convention of 1890 both wrote major changes in suffrage into their creations, and then proclaimed the new constitutions as law without holding the legislatively mandated popular referenda. (Referenda conducted under the suffrage provisions of the old constitutions would have resulted in disapproval of the new instruments.)

[15] Article 1, § 5, of the Constitution gives the House of Representatives the authority to judge challenges to the election of its members. Since 1798, the House has seen fit to exercise this power through procedures enacted into law. Act of Jan. 23, 1798, Ch. 8, 1 Stat. 537. Subsequent modifications of that law appear in 2 U.S.C. §§ 201-226 (1970). Precedents for the use of this class of legislation, despite recognition that the rules enacted by one Congress in this area cannot bind a successor Congress, may be found in 1 Hinds, *Precedents of the House of Representatives* §§ 680, 719, 833 (1907).

In 1969 Congress passed the Federal Contested Elections Act, 2 U.S.C. §§ 381-96 (1970). In the House Report Accompanying that legislation appeared the following:

> Election contests affect both the integrity of the elected process and of the legislative process. Election challenges may interfere with the discharge of public duties by elected representatives and disrupt the normal operations of the Congress. It is essential, therefore, that such contests be determined by the House under modern procedures which provide efficient, expeditious processing of the cases and a full opportunity for both parties to be heard. H.R. Rep. No. 569, 91st Cong., 1st Sess. 3 (1969).

Similarly, Congress decided in 1877 to establish procedures for handling electoral vote disputes for President rather than adopt ad hoc procedures, as it did in 1876 to resolve the Presidential election dispute of that year. That ad hoc resolution led to a great deal of criticism of Congress, as many felt the issue had been decided on the basis of political bias rather than facts. *See generally* 3 U.S.C. § 15 (1970); Rosenbloom, *A History of Presidential Elections* 243 (1965).

[16] *The Federalist No. 43*, *supra* note 2.

[17] J. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding* § 585, at 634 (4th ed. 1887); *cited with approval in Dillon* v. *Gloss*, 256 U.S. 368, 375 (1921).

[18] *The Federalist No. 43*, *supra* note 2, at 204.

[19] 1 *The Records of the Federal Convention of 1787*, at 22 (Farrand ed. 1937) (hereinafter cited as *Farrand*).

[20] 2 *Id.* 188 (emphasis added).

[21] Weinfeld, "Power of Congress over State Ratifying Conventions," 51 Harv. L. Rev. 473, 481 (1938).

[22] 2 *Farrand* 558.

[23] *Id.* 559.

[24] *Id.* 629.

[25] *Id.* 629, 630.

[26] *The Federalist No. 85*, at 403 (Hallowell; Masters, Smith & Co. ed. 1852); (A. Hamilton).

[27] T. Cooley, *The General Principles of Constitutional Law in the United States of America* 15 (2d ed. 1891).

[28] Georgia, Massachusetts, New Hampshire, and Pennsylvania provided for amendments by convention; Delaware, Maryland and South Carolina provided methods of amendment, but not through conventions; New Jersey, New York, North Carolina and Virginia lacked any provisions for amendment; and Connecticut and Rhode Island did not adopt constitutions at that time. The constitution of Vermont (then considered a territory) provided for amendments through convention. Weinfeld, *supra* note 21, at 479.

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[29] Ga. Const. art. LXIII (1777), at 1 B. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (1878) [hereinafter cited as *Poore*].

[30] Pa. Const. § 47 (1776), at 2 *Poore* 1548. Vermont's Constitution of 1786 contained a similar amending article.

[31] "Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Cong., 1st Sess. 41-43 (1927).

[32] A. Sturm, *Methods of State Constitutional Reform* 102 (1954); R. Hoar, *supra* note 3, at 71, 120-1; Dodd, "State Constitutional Conventions and State Legislative Power," 2 Vand. L. Rev. 27 (1948). The following state cases support the proposition: *Opinion of the Justices*, 264 A.2d 342 (Del. 1970); *Chenault* v. *Carter*, 332 S.W.2d 623 (Ky. 1960); *State* v. *American Sugar Refining Co.*, 137 La. 407, 68 So. 742 (1915); *Opinion of the Justices*, 60 Mass. (6 Cush.) 573 (1833); *Erwin* v. *Nolan*, 280 Mo. 401, 217 S.W. 837 (1920); *State ex rel. Kvaalen* v. *Graybill*, 496 P.2d 1127 (Mont. 1972); *Wood's Appeal*, 75 Pa. 59 (1874); *Wells* v. *Bain*, 75 Pa. 39 (1873); *In re Opinion of the Governor*, 55 R.I. 56, 178 A. 433 (1935); *Cummings* v. *Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949); *Quinlan* v. *Houston and Texas Central Ry. Co.*, 89 Tex. 356, 34 S.W. 736 (1896); *Staples* v. *Gilmer*, 183 Va. 613, 33 S.E.2d 158, 158 A.L.R. 495 (1945). *See* Annot. "Power of state legislature to limit the power of a state constitutional convention," 158 A.L.R. 512 (1945).

[33] Roger Hoar has expressed it this way:

> [T]here would be no convention unless the people voted affirmatively, that an affirmative vote would result in holding exactly the sort of convention in every detail provided in the act, and that the people are presumed to know the terms of the act under which they vote. The conclusion drawn from this is that the convention act in its every detail is enacted by the people voting under it. R. Hoar, *supra* note 3, at 71.

[34] *State* v. *American Sugar Refining Company*, 137 La. 407, 415, 68 So. 742, 745 (1915).

[35] *State ex rel. McCready* v. *Hunt*, 20 S.C. (2 Hill's Law) 1,271 (1834).

[36] Nearly 15% of the total number of state constitutional conventions called have been substantively limited in one or more respects. The limited or restricted state constitutional convention has been used frequently since World War II. *See* A. Sturm, *supra* note 4, at 56-60, 113; A. Sturm, "State Constitutions and Constitutional Revision, 1970-1971," in Council of State Gov'ts, *The Book of the States, 1972-1973*, at 20 (1972).

[37] 256 U.S. 368 (1921).

[38] 258 U.S. 130 (1922), where the Court stated: "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."

[39] As Justice Felix Frankfurter has observed: "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945). It is not surprising, therefore, that procedural limitations on conventions have been invalidated. *See Carton* v. *Secretary of State*, 151 Mich. 337, 115 N.W. 429 (1908); *Goodrich* v. *Moore*, 2 Minn. 61 (1858). *See also* Jameson, *supra* note 17, at 364; Dodd, *supra* note 32, at 31, 33.

[40] A number of the Congressional Acts providing for territorial conventions did prescribe that the convention must determine by a majority of the whole number of delegates whether it was expedient for the territory to form a constitution and state government. No such requirement, however, was imposed on the conventions in their

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work of framing such constitutions and governments. *See, e.g.*, Act of April 30, 1802, ch. 40, 1 Stat. 173 (Ohio); Act of Feb. 20, 1811, ch. 21, 3 Stat. 641 (Louisiana); Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 Oklahoma).

Among those few state constitutional conventions, for which the vote needed to govern convention proceedings was established in enabling legislation were the 1967 Pennsylvania convention, and the New Jersey conventions of 1947 and 1966. *See* Law of March 16, 1967, ch. 2 [1967] Pa. Laws 2; Act of Feb. 17, 1947, ch. 8, [1947] N.J. Laws 24; Act of May 10, 1965, ch. 43, [1965] N.J. Laws 101.

When Congress required that the Twenty-First Amendment (ending Prohibition) be ratified by state conventions, rather than legislatures, forty-three states enacted legislation providing for such conventions. Thirty-two of those enabling acts established the vote required of convention delegates for ratification; either a majority of those delegates present and voting (*e.g.*, New Mexico and North Carolina – such acts also established a minimum quorum) or a majority of the total number of delegates (*e.g.* California and Illinois). In no case was the requirement greater than a majority of the total number of delegates. *See* E. Brown, *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* 515-701 (1938).

[41] To be noted is Gerry's criticism of the August 30, 1787 proposal, specifically, his observation that a "majority" of the states might bind the country in the convention contemplated by that proposal *See* pp. 12-13, *supra*. Gerry's criticism eventually led to the inclusion of ratification requirements. *See* Weinfeld, *supra* note 21, at 482-483.

[42] 74 U.S. (7 Wall.) 506 (1869); *criticized in Glidden Co.* v. *Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

[43] *See* Strong, "Three Little Words and What They Didn't Seem to Mean," 59 A.B.A.J. 29 (1973). *See generally* Fairman, "Reconstruction and Reunion, 1864-88," in VI *History of the Supreme Court of the United States* 433-514 (Freund ed. 1971).

[44] The cases are: *United States* v. *Sprague*, 282 U.S. 716 (1931); *Leser* v. *Garnett*, 258 U.S. 130 (1922); *Dillon* v. *Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke* v. *Smith (No. 1)*, 253 U.S. 221 (1920); *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798).

[45] 307 U.S. 433 (1939).

[46] 369 U.S. 186 (1962).

[47] *Id.* 217.

[48] 395 U.S. 486 (1969).

[49] *See Butterworth* v. *Dempsey*, 237 F. Supp. 302 (D. Conn. 1965), involving a court-ordered state constitutional convention on the subject of reapportionment. *Cf. Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972).

[50] 3 U.S. (3 Dall.) 378 (1798).

[51] *Id.* 380 n.(a).

[52] III Journal of the Senate 323 (1803) (motion defeated by a vote of 23 to 7).

[53] Cong. Globe, 38th Cong., 2d Sess. 629-33 (1865). Four years earlier a proposed amendment on slavery was presented to and signed by President Buchanan. No discussion took place in Congress concerning this action and the proposed amendment was never ratified.

[54] VI J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 391-392 (1897).

[55] 253 U.S. 221 (1920).

[56] *Id.* 227.

[57] 285 U.S. 355 (1932).

[58] *Id.* 365, 366.

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[59] *See Coleman* v. *Miller*, 146 Kan. 390, 71 P.2d 518 (1937), *aff'd*, 307 U.S. 433 (1939), upholding the right of a lieutenant governor to cast the tie-breaking vote in the state senate on the ratification of the proposed child labor amendment. In affirming, the United States Supreme Court expressed no opinion as to the propriety of the lieutenant governor's participation.

[60] The results of a questionnaire-type inquiry which we sent to the fifty states indicate that a substantial majority exclude the governor from participation and that in a number that include him it is not clear whether his inclusion is simply a matter of form. Historically, it appears that the governor generally has not played a role in these processes, although there are exceptions to this rule. *See* Myers, "The Process of Constitutional Amendment," S. Doc. No. 314, 76th Cong., 3rd Sess. 18 n.47 (1940), wherein it is stated that governors gave 44 approvals in the ratifications of 15 amendments. Whether the approvals were simply a matter of form or were required as a matter of state law is not clear. In several cases there were gubernatorial vetoes of ratifications, including the governor of New Hampshire's attempted veto of his state's ratification of the twelfth amendment.

[61] H. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History," H. Doc. No. 353, pt. 2, 54th Cong., 2d Sess. 298 (1897); Bonfield, "Proposing Constitutional Amendments by Convention; Some Problems," 39 Notre Dame Lawyer 659, 664-65 (1964); Buckwalter, *supra* note 13, at 551; Brickfield, Staff of House Committee on the Judiciary, 85th Cong., 1st Sess., "Problems Relating to a Federal Constitutional Convention" 7-9 (Comm. Print 1957); Note, "Proposing Amendments to the United States Constitution by Convention," 70 Harv. L. Rev. 1067, 1075 (1957). *But compare* 69 Op. Att'y Gen. of Okla. 200 (1969), in 115 Cong. Rec. 23780 (1969), *with In re Opinion of the Justices*, 118 Maine 544, 107 A. 673 (1919). *See generally* Dodd, *The Revision and Amendment of State Constitutions* 148-55 (1910); Hoar, *supra* note 3, at 90-93; Orfield, *supra* note 12, at 50 & n.30, 66 & n.89.

[62] 3 U.S. (3 Dall.) 378 (1798). *See also Omaha Tribe of Nebraska* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 93 S.Ct. 898 (1973) (governor's approval not required in order for a state to cede jurisdiction over Indian residents); *Ex parte Dillon*, 262 F. 563 (1920) (when the Legislature is designated as a mere agency to discharge some duty of a non-legislative character, such as ratifying a proposed amendment, the legislative body alone may act).

[63] Brickfield, *supra* note 61, at 11-12.

[64] 256 U.S. 368, 375 (1921).

[65] 307 U.S. 433, 453-54 (1939).

[66] Beginning with the proposal of the eighteenth amendment, Congress has, either in the amendment or proposing resolution, included a provision requiring ratification within seven years from the time of the submission to the states.

[67] *See, e.g.*, Note' "Rescinding Memorialization Resolutions," 30 Chi.—Kent L. Rev. 339 (1952).

[68] 397 U.S. 50 (1970).

[69] *Wells* v. *Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 93 S. Ct. 904 (1973).

[70] *Smith* v. *Gore*, 150 W. Va. 71, 143 S.E.2d 791, 794 (1965).

[71] *See Forty-Second Legislative Assembly* v. *Lennon*, 481 P.2d 330 (Mont. 1971); *Jackman* v. *Bodine*, 43 N.J. 453, 470, 476-77, 205 A.2d 713, 722, 726 (1964). In *Butterworth* v. *Dempsey*, 237 F. Supp. 302 (D. Conn. 1965), a federal court ordered, without indicating the basis for it, apportionment of convention delegates on a one-person, one-vote basis. *See also State* v. *State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968), where a section of the state constitution, requiring that any amendments to that constitu-

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tion affecting suffrage or apportionment be approved by both 3/4 of the voters of the state as a whole *and* 2/3 of those voting in each county, was found to violate the 'one-person, one-vote' and equal protection principles, and was accordingly declared invalid. *Contra, West* v. *Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963), *cert. denied*, 378 U.S. 557 (1962), holding equal protection guarantees inapplicable to a state constitutional convention since it had no power to take any final action; *accord, Livingston* v. *Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969); *Stander* v. *Kelley*, 433 Pa. Super. 406, 250 A.2d 474 (1969), *appeal dismissed sub nom. mem., Lindsay* v. *Kelley*, 395 U.S. 827 (1969). *West, Stander and Livingston,* in reaching this result, emphasized the fact that the entire electorate would be afforded a direct and equal voice, in keeping with the 'one-person, one-vote' principle, when the convention's product was submitted for ratification.

[72] 376 U.S. 1 (1964).

[73] *See Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). *See also United States* v. *Pipefitters*, 434 F.2d 1116, 1124 (8th Cir. 1971); *United States* v. *Synnes*, 438 F.2d 764, 771 (8th Cir. 1971); *Henderson* v. *ASCS, Macon County, Alabama*, 317 F. Supp. 430, 434-35 (M.D. Ala. 1970). *See generally Griffin* v. *Richardson*, 346 F. Supp. 1226, 1232-33 (D. Md. 1972).

[74] 93 S.Ct. 979 (1973).

[75] 403 U.S. 182 (1971).

[76] 394 U.S. 526, 531 (1968).

[77] The present 1970 census establishes the mean population of congressional districts as approximately 467,000. As Alaska has a population of approximately 302,000, the absolute differential is over 50%. There are similar disparities in some states with two representatives (*e.g.*, South Dakota's two Congressmen each represent 333,000 people), but they are not as great.

[78] *See United States* v. *Germaine*, 99 U.S. 508 (1878); *United States* v. *Mouat*, 124 U.S. 303 (1888); *United States* v. *Smith*, 124 U.S. 525 (1888). *See generally* 1 Hinds, *Precedents of the House of Representatives* § 493 (1907). In *Board of Supervisors of Elections* v. *Attorney General*, 246 Md. 417, 439, 229 A.2d 388, 395 (1967), the court held that a delegate to a state constitutional convention was not an "officer" so that a member of the legislature was not guilty of dual office-holding when he simultaneously served as a delegate; *accord, Livingston* v. *Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969). *But see Forty-Second Legislative Assembly* v. *Lennon*, 481 P.2d 330 (Mont. 1971); *State* v. *Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935).

[79] *See 1 Farrand* 376; *Reservists Comm. to Stop the War* v. *Laird*, 323 F. Supp. 833 (D.D.C. 1971).

[80] Jameson, *supra* note 17, at § § 582-584; Dodd, "Amending the Federal Constitution," 30 Yale L.J. 321, 346 (1921).

[81] *Wise* v. *Chandler*, 270 Ky. 1, 108 S.W.2d 1024 (1937) (also holding that state legislative *rejection* of a proposed constitutional amendment cannot be reconsidered); *Coleman* v. *Miller*, 143 Kan. 390, 71 P.2d 518 (1937) (dicta). The issue was discussed, though not passed on by the Court, in Chief Justice Hughes' opinion in *Coleman* v. *Miller*, 307 U.S. 433, 447-50 (1938).

[82] This rule would take precedence over the action of Congress in refusing to permit New Jersey and Ohio to rescind their ratifications of the fourteenth amendment. The right to ratify after a previous rejection would confirm precedents established in connection with the ratifications of the Thirteenth and Fourteenth Amendments. *See generally* Myers, *The Process of Constitutional Amendment*, S. Doc. No. 314, 76th Cong., 3rd Sess. (1940).

[83] S. Rep. No. 336, 92nd Cong., 1st Sess. 2 (1971).

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This appendix is designed to capsulize our comments regarding various principles reflected in S. 1272 and to cross-reference pertinent parts of our report. The underlining, insertions (noted by brackets) and deletions which appear in S. 1272 have been supplied by us for the purpose of illustrating our comments.

93rd Congress
1st Session
S. 1272

IN THE SENATE OF THE UNITED STATES
March 19, 1973
Referred to the Committee on the Judiciary
Passed the Senate July 9, 1973

COMMENTS

A BILL

Our views as to the desirability of legislation implementing the convention method of initiating amendments appear at pages 7 to 9.

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Federal Constitutional Convention Procedures Act".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

Sec. 2 Our views as to the limitability of a convention are set forth at pages 9 to 17.

The phrase "nature of the amendment or amendments" is unclear and differs from the phraseology contained in Sections 4, 5, 6, 8, 10 and 11. Our discussion of this item appears at pages 18, 19, 30 and 31.

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States on and after the enactment of this Act, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and *stating the nature of the amendment or amendments to be proposed.*

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APPLICATION PROCEDURE

Sec.3
(a) For the reasons set forth at pages 28 to 30, we believe that a state governor should have no part in the process by which a state legislature applies for a convention. This section is unclear as to whether a state may on its own initiative assign a role to the governor. The phraseology concerning the governor also is different from that employed in Section 12(b) with respect to ratification. Additionally, the requirement that state statutory procedures "shall" apply to applications differs from the terminology of Section 12(b) as well as raises questions under *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922). See *Trombetta v. Florida*, 393 F. Supp. 575 (D. Fla. 1973).

SEC. 3. (a) For the purpose of adopting or rescinding a resolution pursuant to section 2 and section 5, the State legislature *shall follow the rules of procedure that govern the enactment of a statute* by that legislature, but without the need for approval of the legislature's action by the governor of the State.

(b) As discussed at pages 20 to 25, the Committee believes that limited judicial review is necessary and desirable and has specifically so provided in a new proposed Section 16. The introduction of such review requires the deletion of the language regarding the binding nature of congressional determinations. The "clearly erroneous" standard suggested in our proposed Section 16 acknowledges the appropriateness of initial congressional determinations in this area but withdraws the finality of such decisions.

(b) Questions concerning the adoption of a State resolution cognizable under this Act shall be [determined]
~~determinable~~ by the Congress of the United States ~~and its decisions thereon shall be binding on all others, including State and Federal courts~~.

TRANSMITTAL OF APPLICATIONS

SEC. 4 (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the

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application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution;

[(2) *to the extent practicable a list of all state applications in effect on the date of adoption whose subject or subjects are substantially the same as the subject or subjects set forth in the application;*]

(2) *New.* Inasmuch as each legislature receives a copy of all valid applications pursuant to Section 4(d) [4 (c) in S.1272], preparation of the list would be a simple task. In doing so, the state would be able to express the purpose of its application in relation to those already received, thereby assisting Congress in rendering its determination pursuant to Section 6 (a) as to whether the requisite number of applications have been received on "the same subject."

[3]

~~(2)~~ the exact text of the resolution signed by the presiding officer of each house of the State legislature; and

[4]

~~(3)~~ The date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

[(c) Upon receipt, an application shall be deemed valid and in compliance with article V of the Constitution and this Act, unless both Houses of Congress prior to the expiration of 60 days of continous session of Congress following the receipt of such application shall by concurrent resolution determine the application is invalid, either in whole or in part. Failure of Congress to act within the specified period is a determination subject to review under section 16 of this Act. Such resolution shall set forth with particularity the ground or grounds for any such determination. The 60-day period referred to herein shall be computed in accordance with section 11(b) (2) of this Act.]

(c) *New.* The adoption of judicial review requires that courts be able to define the accrual of grievances with particularity. S.1272 leaves uncertain the status of an application or rescission absent specific congressional action. Our proposed new Section 4(c) limits the period of uncertainty to 60 days. If Congress does not act upon a state transmittal within that period, it is deemed valid. The period for judicial review thus begins to run no later than 60 days after receipt of the application.

The possibility of a Senate filibuster blocking rejection of a patently defective application, thus causing the application to be deemed valid under Section 4(c), is offset by the fact that an action would lie under Section 16(a) for declaratory relief. Section 4(c) expressly notes that such a failure to act is subject to review under Section 16. State legislators as well as

members of Congress would appear to qualify as "aggrieved" parties. See *Coleman v. Miller*, 307 U.S. 433 (1939).

Section 4(c) thus results in an early determination of the application's procedural aspects. Only the question of the similarity of an application's subject to the subject of other applications is reserved for later determination by Congress.

(d) Same as present Section 4(c) of S.1272 except for the suggested insertions, which are designed to reflect the introduction of judicial review. The requirement for transmittal of applications to state legislatures is limited to valid applications.

[d]
~~(e)~~ Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is the presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. [Within the 60-day period provided for in Section 4(c),] the President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States, [provided, however, that an application declared invalid shall not be so transmitted.]

EFFECTIVE PERIOD OF APPLICATION

(a) For the reasons set forth at pages 31 and 32, the Committee agrees that some time limitation is necessary and desirable but takes no position on the exact time, except believes that four or seven years would be reasonable and that a congressional determination as to either should be accepted.

The Committee's views as to the use of the "same subject" test appear at pages 18, 19, 30 and 31.

SEC. 5 (a) An application submitted to the Congress by a State, unless sooner rescinded by the State legislature shall remain effective for seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the *same subject* all such applications shall remain in effect until the Congress has taken action on a concurrent resolution pursuant to section 6, calling for a constitutional convention.

(b) We believe that it is desirable to have a rule such as that contained in this section permitting the withdrawal of an application. See our discussion of this point at pages 32 and 33.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission *in conformity with the procedure specified* in sections 3 and 4, except that no such rescission shall be effective as to any valid application made for a

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As for the requirement respecting the procedures to be followed, see our comments to Section 3(a).

constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subjects.

(c) See our comments to Section 3(b).

Questions concerning the recission of a State's application shall be determined by the Congress of the United States ~~and its decisions shall be binding on all others including State and Federal courts.~~

CALLING OF A CONSTITUTIONAL CONVENTION

With regard to "the nature of the amendment or amendments" phraseology, see our comments to Section 2.

The concurrent resolution calling the convention may also have to deal with such questions as to when the election of delegates will take place.

The position that the President has no place in the calling process is discussed at pages 25 to 28.

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. *Each such concurrent resolution shall* (1) designate the place and time of meeting of the convention, and (2) *set forth the nature of the amendment or amendments for the consideration of which the convention is called.* A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

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(b) The convention shall be convened not later than one year after adoption of the resolution.

DELEGATES

The Committee believes that the principle of one person, one vote applies and that Section 7(a) violates that principle. The Committee is of the view that an apportionment plan which allotted to each state a number of delegates equal to its representation in the House of Representatives should be an acceptable compliance with those standards. This subject is discussed at pages 34 to 37.

The persons entitled to vote for delegates could be more clearly stated to include all persons entitled to vote for members of the House of Representatives. The manner of nominating persons for delegate election might, as provided by S.1272, best be left to each state.

The question of the eligibility of members of Congress to be delegates is discussed at page 37.

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each congressional district in the manner provided by State law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of each state.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefor in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

CONVENING THE CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not

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named or described in the concurrent resolution of the Congress by which the convention was called. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) There is hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention.

(c) The Administrator of General Services shall provide such facilities, and the Congress and each executive department and agency shall provide such information and assistance, as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

The Committee agrees with the principle that each delegate have one vote.

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

(a) The Committee believes that Congress should not impose a vote requirement on a convention. It views as unwise and of questionable validity any attempt to regulate the internal pro-

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of *two-thirds of the total number of delegates to the convention.*

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cedures of a convention. It also notes that the vote requirement in S.1272 based on the total number of delegates is more stringent than that required for amendments proposed by Congress. See pages 17 to 20 of this report.

(b) See our comments to Section 2 with regard to the underlining and our comments to Section 3(b) as for the deletions.

(b) No convention called under this Act may propose *any amendment or amendments of a nature different from that stated* in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined ~~solely~~ by the Congress of the United States ~~and its decisions shall be binding on all others, including State and Federal courts~~.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b) The position that the President has no place in this process is discussed at pages 25 to 28.

(b) (1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (a) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment *relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution* of the Congress by which the convention was called, or because the procedures followed by the convention

As for the language "relates to or includes a subject" in (B), see our comments to Section 2.

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in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligations imposed upon them by the first sentence of this paragraph.

(2) For the purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of ninety days.

(c) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the time within which and the manner in which such amendment shall be ratified, and a copy of this Act.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the *State legislatures shall adopt their own rules of procedure.* Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(b) It is not clear whether this section would accept any special limitation adopted by a state with respect to ratification, other than the assent of the governor or any other body. See our comments to Section 3(a).

The exclusion of the governor from the process, with which we agree, is discussed at pages 28 to 30.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amend-

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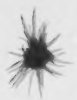
ment to the Constitution shall become valid when ratified by the legislatures of three-fourths of the several States within seven years from the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.



RECISSION OF RATIFICATIONS

(a)-(b) As discussed at pages 37 and 38, the Committee agrees with the principle permitting a state to rescind a ratification or rejection vote.

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendments by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) See our comments to Section 3(b).

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States, shall be determined ~~solely~~ by the Congress of the United States ~~and its decisions shall be binding on all others, including State and Federal courts.~~

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified,

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then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

JUDICIAL REVIEW

[SEC. 16. (a) Determinations and findings made by Congress pursuant to the Act shall be binding and final unless clearly erroneous. Any person aggrieved by any such determination or finding or by any failure of Congress to make a determination or finding within the periods provided in this Act may bring an action in a district court of the United States in accordance with 28 U.S.C. § 1331 and 28 U.S.C. § 2201 without regard to the amount in controversy. The action may be brought against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. The district courts of the United States shall have exclusive jurisdiction of any proceedings instituted pursuant to this Act, and such proceedings shall be heard and determined by three judges in accordance with 28 U.S.C. § 2284. Any appeal shall be to the Supreme Court.]

New. The purpose of our proposed Section 16 is to provide limited judicial review of controversies arising under S.1272. The procedural framework of the bill sets forth clear standards for adjudication of many of the potential controversies, and to this extent judicial interpretation of the act does not differ from the normal role of the courts. Moreover, determinations such as the similarity of applications or the conformity of proposed amendments to the scope of the convention call are no more difficult than, say, interpretation of the general language of the antitrust laws or the securities acts. The fact that these questions occur in a constitutional context does not diminish the skill of the Bench to interpret and develop the law in light of the factual situations of a given controversy.

Selection of a three-judge district court as the initial forum for controversies acknowledges that many controversies may be essentially state questions. For example, Congress might reject an application because of a defect in the composition of the state legislature. *Cf., Petuskey v. Rampton,* 307 F. Supp. 231, 235 (D. Utah 1969), *aff'd,* 431 F. 2d 378 (10th Cir. 1970), *cert. denied,* 401 U.S. 913. In this instance, it seems preferable to provide that the district court, schooled in state matters, make the initial review. Appeal from three-judge courts would lie in the United States Supreme Court.

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New. This subsection would establish a short limitation period. Since the introduction of judicial review should not be allowed to delay the amending process unduly, any claim must be raised promptly. The limitations period combined with expedited judicial procedures is designed to result in early presentation and resolution of any dispute.

[(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.]

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Article V Applications Submitted Since 1789

PART ONE: A Tabulation of Applications by States and Subjects

By Barbara Prager and Gregory Milmoe*

A Note on the Table:

This table is offered as a comprehensive compilation of Article V applications categorized by state and by application content. The table maximizes the number of applications, *i.e.*, whenever any source recognizes an application, it has been included in this table. For this reason it must be emphasized that the totals are valuable only as an overview and not for the purpose of determining whether two-thirds of the states have applied for a convention on any given category.

Allowing for slight semantic differences among the authorities consulted, the categories used are, for the most part, generally accepted. Any readily discernible differences are set forth in the notes below. A more serious problem is the sometimes sharp disparity among the sources consulted with regard to what should be recognized as an application. Rather than attempt to make definitive judgments as to what applications should be treated as such, we have set out in the notes below the generally recognized applications followed by the applications recognized by particular sources.

A total of six sources were selected for consultation in the preparation of this table. They are:

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*Barbara Prager is a student at New York Law School and Gregory Milmoe a student at Fordham Law School. We are deeply grateful to them for their time and efforts in preparing these documents for our Committee and are pleased to have them accompany our report. We believe they present an excellent overview of the types of applications which have been submitted to Congress since the adoption of the Constitution.

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MISSISSIPPI					1					1		1						2		2	7
MISSOURI	1	3							1			2								1	8
MONTANA		6	1		1		1					2			1					1	13
NEBRASKA		4	1		1							1			1	1					9
NEVADA		6		1	1							3						1			12
NEW HAMPSHIRE			1		2							1					1				5
NEW JERSEY	1	1		1	1	1											1			1	7
NEW MEXICO					1							1									2
NEW YORK	1		1	1																2	5
NORTH CAROLINA	1	2				1						1									5
NORTH DAKOTA		1	1									2		1			1				6
OHIO	1	2	1														2				6
OKLAHOMA		1	1		1				1			2			1			1			8
OREGON	1	6	1														1			1	10
PENNSYLVANIA		1	2		1															1	5
RHODE ISLAND					1							1					1			1	4
SOUTH CAROLINA	1		1		1				1			2	1								7
SOUTH DAKOTA		3	1		1				3			2			1		1				2
TENNESSEE		4	1		1							1							1	1	9
TEXAS	1	2	1		1				2			2			1		1	1		3	15
UTAH		1			1							2			1						5
VERMONT			1																		1
VIRGINIA	2				1				1	1		2				1			1	1	10
WASHINGTON	1	1	2									1									5
WEST VIRGINIA			1														1				2
WISCONSIN	2	3	1	1	1		1								1					1	11
WYOMING		1			2				1			1	1							1	7
TOTAL APPLICATIONS BY SUBJECT	18	75	30	5	42	8	5	3	19	6	4	54	5	4	11	3	21	7	4	36	356

Twenty Categories of Applications:	GENERAL	DIRECT ELECTION OF SENATORS	ANTI-POLYGAMY	REPEAL OF PROHIBITION 21ST AMEND.	LIMITATION OF FED. TAXING; REPEAL 16TH AMEND.	WORLD FEDERAL GOVERNMENT	LIMIT PRESIDENTIAL TENURE	TREATY MAKING	REVISION OF ARTICLE V	EXCLUSIVE STATE JURISDICTION OVER SCHOOLS	SUPREME COURT DECISIONS	APPORTIONMENT	COURT OF THE UNION	PRAYER IN SCHOOLS	REDISTRIB. OF PRES. ELECTORS	PRESIDENTIAL DISABILITY & SUCCESSION	REVENUE SHARING	FREEDOM OF CHOICE OF SCHOOLS	PROHIBIT STATE OR MUNI. BOND TAX	MISC.	TOTALS BY STATE
ALABAMA					1							2	1				1			3	8
ALASKA												1									1
ARIZONA												1		1							2
ARKANSAS		3			1				1		1	2	1		1					1	11
CALIFORNIA		3	1			1						1								3	9
COLORADO		1			1							2			1	1				1	7
CONNECTICUT			1			1														1	3
DELAWARE			1		1				1								1				3
FLORIDA					1	3		1	1		1	1	1				2			1	12
GEORGIA	1				1			1		3	1	1					1				9
HAWAII																			1		1
IDAHO		2			1				2			2								2	9
ILLINOIS	1	3	1		1		1		2			2			1		1			1	14
INDIANA	1	1			2			1	1			2								1	9
IOWA		4	1		2		1					1					1				10
KANSAS		4			1				1			2			1						9
KENTUCKY	2	1			1							1									5
LOUISIANA		1	1		2					1	1	1					2	1	1	2	13
MAINE		1	1		2	1											1				6
MARYLAND			2		1							1		1			1				6
MASSACHUSETTS				1	1									1						3	6
MICHIGAN		1	1		2		1		1									1			7
MINNESOTA		2	1									1									4

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Buckwalter, "Constitutional Conventions and State Legislators," 20 J.Pub.L. 543 (1971) [hereinafter cited as *Buckwalter*]; *Graham*, "The Role of the States in Proposing Constitutional Amendments," 49 A.B.A.J. 1175 (1963) [hereinafter cited as *Graham*]; E. Hutton, State Applications to Congress Calling for Conventions to Propose Constitutional Amendments (January 1963 to June 8, 1973), June 12, 1973 (Library of Congress, Congressional Research Service, American Law Division Paper) [hereinafter cited as *Library of Congress Study*]; *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 115-18 (1967) [hereinafter cited as *1967 Hearings*]; Tydings, *Federal Constitutional Convention*, S. Doc. No. 78, 71st Cong., 2d Sess. (1930) [hereinafter cited as *1930 S.Doc.*]; and W. Pullen, "The Application Clause of the Amending Provision of the Constitution," 1951 (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].

It should be noted that certain of the studies consider only limited time periods and, therefore, were consulted only for the time periods indicated: *Buckwalter* (1788-1971); *Graham* (1788-1963); *Library of Congress Study* (1963-73); *1967 Hearings* (1963-67); *1930 S. Doc.* (1788-1911); Pullen (1788-1951).

General

Buckwalter, Pullen, 1930 S. Doc. and *Graham* were consulted. All sources cite: Ga. 1832; Mo. 1907; N.Y. 1789; Tex. 1899; Ga. 1788; Wis. 1929.

Buckwalter, Pullen and *Graham* cite: Ill. 1861; Ind. 1861; Ky. 1861; Ohio 1861; Wash. 1901; Wis. 1911.

Buckwalter and *Graham* cite: Va. 1861.

Pullen cites: Ky. 1863; N.J. 1861; N.C. 1866; Ore. 1864; S.C. 1832.

Buckwalter apparently categorized 15 applications as "General" applications, which he also included in his "Direct Election of Senators" category. They are: Colo. 1901; Ill. 1903; Iowa 1907, 1909; Kan. 1901, 1905, 1907; La. 1907; Mont. 1911; Neb. 1907; Nev. 1907; N.C. 1907; Okla. 1908; Ore. 1901; Wash. 1903.

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Direct Election of Senators

Pullen, Graham, 1930 S. Doc., and *Buckwalter* were consulted. All sources cite: Ark. 1901, 1903; Cal. 1903, 1911; Colo. 1901; Idaho 1903; Ill. 1903, 1907, 1909; Ind. 1907; Idaho 1901*; Iowa 1904, 1909; Kan. 1907; Ky. 1902; La. 1907; Me. 1911; Mich. 1901; Minn. 1901; Mo. 1901, 1905; Mont. 1901, 1905, 1907, 1911; Neb. 1893, 1901, 1903, 1907; Nev. 1901, 1903, 1907; N.J. 1907; N.C. 1901, 1907; Ore. 1901, 1903, 1909; Pa. 1901; S.D. 1901, 1907, 1909; Tenn. 1901, 1905; Tex. 1901; Utah 1903; Wash. 1903; Wis. 1903, 1907.

Pullen, Graham and *Buckwalter* cite: Ark. 1911; Iowa 1907; Minn. 1911; Mo. 1903; Mont. 1903; Nev. 1905; N.D. 1903; Ohio 1908, 1911; Okla. 1908 [*1930 S. Doc.* dated this application 1909]; Tenn. 1903; Tex. 1911.

Graham, Buckwalter and *1930 S. Doc.* cite: Kan. 1901; Wyo. 1895.

Graham and *Buckwalter* cite: Kan. 1905, 1909; Mont. 1908; Wis. 1908; Ore. 1907.

Pullen, Graham and *1930 S. Doc.* cite: [as second applications] Ore. 1901, 1903.

1930 S. Doc. cites: [second applications] Iowa 1904.

Pullen cites: [second applications] Cal. 1911; Tenn. 1901; Nev. 1901; Iowa 1911; Ore. 1909.

**Graham, Pullen* and *1930 S. Doc.* note that this application proposed the direct election of the President and Vice President as well as Senators.

Anti-Polygamy

Pullen, Graham, Buckwalter and *1930 S. Doc.* were consulted. All sources cite: Del. 1907; Ill. 1913; Mich. 1913; Mont. 1911; Neb. 1911; N.Y. 1906; Ohio 1911; S.D. 1909; Tenn. 1911; Vt. 1912; Wash. 1909; Wis. 1913.

Pullen, Graham, and *Buckwalter* cite: Cal. 1909; Conn. 1915; Iowa 1906; La. 1916; Me. 1907; Md. 1908, 1914; Minn. 1909; N.H. 1911; Okla. 1911; Ore. 1913; Pa. 1907, 1913; S.C. 1915; Tex. 1911; W. Va. 1907.

Graham and *Buckwalter* cite: N.D. 1907; Wash. 1910.

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Repeal of Prohibition	*Pullen, Buckwalter* and *Graham* were consulted. All sources cite: Mass. 1931; Nev. 1925; N.J. 1932; N.Y. 1931; Wis. 1931.
Limitation of Federal Taxing Power and Repeal of 16th Amendment	*Graham* and *Buckwalter* were consulted.+ All sources cite: Ala. 1943[r]; Ark. 1943[r]; Del. 1943; Fla. 1951; Ga. 1952[(a)]*; Ill. 1943[r]; Ind. 1943, 1957; Iowa 1941[r] 1951; Kan. 1951; Ky. 1944[r]; La. 1950[r]; Me. 1941, 1951[r]; Mass. 1941[r]; Mich. 1941, 1949; Miss. 1940; Neb. 1949[r]; N.H. 1943, 1951; N.J. 1944[r]; N.M. 1951; Nev. 1960[(a)]; Okla. 1955; Pa. 1943; R.I. 1940[r]; Utah 1951; Va. 1952[(a)]*; Wis. 1943[r]; Wyo. 1939; S.C. 1962[(a)]. +Packard, "Constitutional Law; The States and the Amending Process," 45 A.B.A.J. 161 (1959), limiting his discussion to this subject, lists applications (undated) from: Idaho, Mont., S.D. and Tenn., none of which are cited by any other source. *Graham* cites: Colo. 1963; La. 1960[(a)]; Md. 1939; Tex. 1961[(a)]; Wyo. 1959[(a)]. [(a)] Repeal of 16th Amendment. **Graham* cites these as Repeal applications while *Buckwalter* merely cites them as tax limitation applications. r = Rescinded
World Federal Government	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Cal. 1949*; Conn. 1949; Fla. 1949; Me. 1949; N.J. 1949*; N.C. 1949* *Graham* and *Buckwalter* cite: Fla. 1943, 1945. *Rescinded
Limit Presidential Tenure	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Ill. 1943; Iowa. 1943; Mich. 1943; Mont. 1947; Wis. 1943.
Treaty Making of the President	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Fla. 1945. *Buckwalter* and *Graham* cite: Ga. 1952; Ind. 1957.
Revision of Article V	*Buckwalter, Graham,* and *Library of Congress Study** were consulted. All sources cite: Ark. 1963; Fla. 1963; Idaho 1963; Ill. 1963; Kan. 1963[r]; Mo. 1963; Okla. 1963; S.C. 1963; S.D. 1963; Tex. 1963; Wyo. 1963.

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Buckwalter and *Graham* cite: Idaho 1957; Ill. 1953; Ind. 1957; Mich. 1956; S.D. 1953, 1955; Tex. 1955.

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

r = Rescinded

Buckwalter and *Library of Congress Study* cite: Va. 1965.

Give States Exclusive Jurisdiction Over Public Schools

Buckwalter, Graham and *Library of Congress Study* were consulted.

Buckwalter and *Graham* cite: Ga. 1955, 1959.

Buckwalter and *Library of Congress Study* cite: Ga. 1965; La. 1965; Miss. 1965.

Graham cites: Va. 1960*

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

Supreme Court Decisions

Graham was the only source consulted.

Graham cites: Ark. 1961; Fla. 1957; Ga. 1961; La. 1960.

Apportionment

Buckwalter, 1967 Hearings, and *Library of Congress Study* were consulted. All sources cite: Ala. 1965; Ariz. 1965; Ark. 1963, 1965; Colo. 1965; Fla. 1965; Idaho 1963, 1965; Ill. 1967; Ind. 1967; Kan. 1963^{r}, 1965^{r}; Ky. 1965; Md. 1965; Minn. 1965; Miss. 1965; Mo. 1963, 1965; Mont. 1963, 1965; Neb. 1965; Nev. 1963, 1967; N.H. 1965; N.M. 1966; N.C. 1965; N.D. 1967; Okla. 1965; S.C. 1965; S.D. 1965; Tenn. 1966; Tex. 1963, 1965; Utah 1965; Va. 1964, 1965; Wash. 1963; Wyo. 1963.

Buckwalter and *Library of Congress Study* cite: Ala. 1966; Colo. 1967; Iowa 1969; Ill. 1965; N.D. 1965.

Buckwalter and *1967 Hearings* cite: Ga. 1965; La. 1965; S.C. 1963.

Library of Congress Study and *1967 Hearings* cite: S.D. 1963.

Buckwalter cites: Ind. 1957.

Library of Congress Study cites: Alaska 1965; Cal.

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	1965; Nev. 1965; Okla. 1963; R.I. 1965; Utah 1963. r = Rescinded
Court of the Union	*Graham, Library of Congress Study,* and *Buckwalter* were consulted. All sources cite: Ala. 1963; Ark. 1963; Fla. 1963. *Graham* and *Buckwalter* cite: S.C. 1963; Wyo. 1963.
Prayer in Schools	*Buckwalter* and *Library of Congress Study* were consulted. All sources cite: Mass. 1964. *Library of Congress Study* cites: Ariz. 1972; Md. 1966; N.D. 1963.
Redistribution of Presidential Electors	*Buckwalter, Graham,* and *Library of Congress Study* were consulted. All sources cite: Ark. 1963; Kan. 1963[r]; Mont. 1963; Utah 1963; Wis. 1963. *Buckwalter* and *Library of Congress Study* cite: Neb. 1965; Okla. 1965. *Buckwalter* and *Graham* cite: Tex. 1963. *Buckwalter* cites: Ill. 1967. While *Buckwalter* cites Colo. 1965 and S.D. 1965, *Graham* cites those applications as Colo. 1963 and S.D. 1963. r = Rescinded
Presidential Disability and Succession	*Library of Congress Study* was the only source consulted. The study cites: Colo. 1965; Neb. 1965; Va. 1965.
Revenue Sharing	*Buckwalter* and *Library of Congress Study* were consulted. All sources cite: Ala. 1967; Fla. 1969; Ill. 1965: Ohio 1965; Tex. 1967. *Buckwalter* cites: N.H. 1969. *Library of Congress Study* cites: Del. 1971; Fla. 1971; Ga. 1967; Iowa 1972; La. 1970*, 1971; Mass. 1971; N.J. 1970; N.D. 1971; Ore. 1971; S.D. 1971; Ohio 1971; W. Va. 1971. Received by the Committee from the Attorney Generals of the respective states: Me. 1971; R.I. 1971. *The La. 1970 application was approved by its House of Representatives only.

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Freedom of Choice in Selection of Schools

Library of Congress Study was the only source consulted. The study cites: La. 1970; Mich. 1971; Miss. 1970, 1973; Nev. 1973; Okla. 1973; Tex. 1973.

Prohibit Taxation of State or Municipal Bonds

Library of Congress Study was the only source consulted. The study cites: Hawaii 1970; La. 1970; Tenn. 1970; Va. 1970.

Miscellaneous

Alabama
1833—Nullification: *1930 S. Doc.* and *Graham.* Because the resolution of the Alabama Legislature was worded "This assembly . . . recommends to the Congress . . ." *Pullen* views it as merely a recommendation rather than a formal application.
1957—Selection of Federal Judges: *Graham.*
1959—Federal Pre-emption: *Graham.*

Arkansas
1959—Examination of 14th Amendment Ratification: *Buckwalter* and *Graham.*

California
1935—Federal Regulation of Wages and Hours: *Buckwalter* and *Graham.*
1935—Taxation of Federal and State Securities: *Buckwalter, Graham,* and *Pullen.*
1952—Distribution of Proceeds of Federal Taxes on Gasoline: *Buckwalter* and *Graham.*

Colorado
1963—Direct Election of President and Vice President: *Library of Congress Study.*

Connecticut
1958—State Tax on Income of Non-residents: *Graham.*

Florida
1972—Replace the Vice President as Head of the Senate: *Library of Congress Study.*

Idaho
1927—Taxation of Federal and State Securities: *Buckwalter, Graham,* and *Pullen.*
1963—Federal Debt Limit: *Buckwalter, Graham,* and *Library of Congress Study.*

Illinois
1911—Prevention and Suppression of Monopolies:

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Buckwalter, Graham, and *Pullen.*

Indiana
1957–Balancing the Budget: *Buckwalter* and *Graham.*

Louisiana
1920–Popular Ratification of Amendments: *Buckwalter, Graham,* and *Pullen.*
1970–Sedition and Criminal Anarchy: *Library of Congress Study.*

Massachusetts
1964–Pensions to Persons Over 65: *Buckwalter* and *Library of Congress Study.*
1967–Bible Reading in Public Schools: *Library of Congress Study. Buckwalter* cites this application as 1964.
1973–Public Funds for Secular Education: *Library of Congress Study.*

Mississippi
1965–Control Communist Party in U.S.: *Buckwalter* and *Library of Congress Study.*
1973–Prayer in Public Buildings: *Library of Congress Study.*

Missouri
1913–Constitutionality of State Enactments: *Buckwalter, Graham,* and *Pullen.*

Montana
1963–Direct Election of President and Vice President: *Library of Congress Study.*

New Jersey
1965–Residence of Members of Congress: *Library of Congress Study.*

New York
1965–Equal Rights for Women: *Library of Congress Study.*
1972–Public Funds for Secular Education: *Library of Congress Study.*

Oregon
1939–Townsend Plan: *Buckwalter, Graham,* and *Pullen.*

Pennsylvania
1943–Prohibition of Conditions in Grants–in–Aid: *Buckwalter, Graham,* and *Pullen.*

Rhode Island
1790–Revision of Constitution: *Graham.*

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Tennessee
1972—Prohibit Interference with Neighborhood Schools: *Library of Congress Study.*

Texas
1949—Tidelands Problem: *Buckwalter, Graham,* and *Pullen.*
1957—Oil and Mineral Rights: *Graham*
1957—Preservation of States' Rights: *Graham*

Virginia
1973—Prohibiting Deficit Spending: *Library of Congress Study.*

Wisconsin
1973—Right to Life: Received by the Committee from the Attorney General of the state.

Wyoming
1961—Balancing of Budget: *Buckwalter*

PART TWO: A History of Applications

by Barbara Prager

Introduction

Article V of the Constitution provides that "The Congress on the Application of the Legislatures of two-thirds of the Several States shall call a Convention for proposing Amendments . . ." Since 1788, despite a total of more than 300 applications from every state in the Union, there has never been a convention convened by this process. The purpose of this paper is to analyze the unsuccessful attempts made to amend the Constitution by this procedure. When applicable, the following factors will be discussed: description of the problem, reasons for the use of the application process, nature of the requests, reasoning of the states declining to make application to Congress, and the resolution of the problem.

Bill of Rights

The first group of applications was provoked by dissatisfaction with the scope of the Constitution. The Anti-Federalists felt that the Constitution had not provided for certain basic rights of mankind. During the ratification of the Constitution, the Virginia and New York legislatures submitted separate resolutions to Congress applying for a convention. The text of the Virginia resolution read in part:

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> that a convention be immediately called . . . with full power to take into their consideration the defects of this constitution that have been suggested by the State conventions . . . and secure to ourselves and our latest posterity the great and unalienable rights of mankind.[1]

Madison and Jefferson opposed the idea of a second convention. Madison expresssed the view that a second convention would suggest a lack of confidence in the first. Others believed that proposing amendments to the Constitution might better be accomplished by Congress. These sentiments found support in the state legislatures. Pennsylvania and Massachusetts explicitly rejected the idea of a second convention, and the remaining states took no final action in making application to Congress.[2]

The underlying issue was resolved in 1789 when Congress proposed the Bill of Rights.

The Nullification Applications

South Carolina was in severe economic difficulty in the eighteen-twenties. Believing that this problem was a result of the high protective tariff levied by the federal government, the state developed the nullification theory, *i.e.*, that a sovereign state could declare an act of Congress null and void. James Hamilton, Jr. advocated a convention of the states to resolve this conflict and recommended to the South Carolina legislature that they apply to Congress for such a convention. South Carolina's petition and a similar application from Georgia took the form of resolutions that Congress call a convention for the purpose of resolving questions of disputed power.[3] Alabama recommended to her co-states and to Congress that a convention be called to resolve the nullification problem and to make "such other amendments and alterations in the Constitution as time and experience have discovered to be necessary."[4]

No other state petitioned for a convention. The problem was considered and the idea of a convention rejected in eight states.[5] Opposition to the South Carolina proposal was manifold. Some objecting to the terminology of the proposal, maintained that an article V convention must be a convention of the people's delegates, and not a convention of the states' representatives. Others, disagreeing with South Carolina's statement that the convention would have the power to determine the constitutional issue, asserted that the conven-

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tion was limited to proposing amendments. Still others feared the potentially disastrous effects of a convention or considered the call of a convention impolitic, inexpedient, unnecessary, or an appalling task.

The states that declined to apply to Congress during this period apparently were not reaching the merits of the issue. Rather, they rejected the idea of a convention on two main grounds: (1) that South Carolina hoped to invest the convention with arbitration power not provided for by the Constitution; and (2) that such a body would not be subject to sufficient control and might therefore upset the existing governmental structure.

Slavery

The devisive issue of slavery was the next issue to provoke state applications. In 1860 the secession of the lower southern states seemed probable. Seeking to effect a reconciliation, President Buchanan proposed that an explanatory amendment to the Constitution be initiated either by Congress or by the application procedure. In support of this suggestion several Congressmen introduced resolutions in Congress to encourage the legislatures of the states to make applications for the call of a convention. This represented the first attempt by Congress to stimulate the application process. The process received further support from newly elected President Lincoln who in his inaugural address stated:

> the convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. . . .[6]

The states, however, were less enthusiastic. During the entire Civil War period, only seven states took affirmative action.[7] The applications tended to be broad in scope, requesting a convention to propose amendments to the Constitution. Several resolutions were merely recommendations that Congress call a convention, while others favored a convention only as a last resort and preferred to rely on Congress to propose any amendments. Many resolutions were tabled in the state legislatures or were referred to a committee which failed to report them back to the legislature. The state of Iowa observed that since eleven states were in open

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rebellion against the Union, no amendment could be ratified without the votes of at least two rebel states.[8]

Procedural problems played a large role in the states' failure to make successful use of the application process during the Civil War period. Given the frenetic pace of the times, the states failed either to act in strict conformity with article V or to direct their energies to the completion of the process.

Modern Period

Since the turn of the twentieth century, the application process has been used primarily to encourage Congress to propose specific amendments.

Direct Election of Senators

In the eighteen-nineties public sentiment grew for an amendment providing for the direct election of U.S. Senators. On several occasions from 1893 to 1902, the House passed resolutions proposing such an amendment which never came to a vote in the Senate.

In 1906, motivated by the inaction of Congress, a conference of twelve states met and decided to initiate a campaign to urge applications on the direct election issue from the requisite number of states. Thirty states adopted sixty-nine applications for the call of a convention during the period from 1901 to 1911.[9] Opposition came primarily from two sources: (1) those who objected to the substance of the amendment; and (2) those who feared the potential power of such a convention. The latter group expressed the view that a convention would open the door to recommendations for amendments on a wide variety of sectional interests. The issue was resolved in 1912 when Congress proposed the seventeenth amendment.

Polygamy

Utah was admitted into the Union in 1896, on the condition that her constitution included an irrevocable prohibition of polygamous marriages. Later, when it was brought to public attention that the state was not enforcing this provision, an anti-polygamy amendment to the Constitution which would give the United States jurisdiction of the matter was proposed as a possible solution. However, the amendment was opposed on several grounds: it would interfere with the sovereignty of

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the states; the subject was not of sufficient importance to merit a constitutional amendment; and the problem was susceptible of resolution by other means. The state legislatures, however, did not dismiss the problem as quickly as Congress did. From 1906 to 1916, twenty-six states made almost identical applications requesting a convention to propose an amendment prohibiting polygamous marriages.[10] But after this surge of applications, polygamy ceased to be an issue.

Repeal of Prohibition

A movement for the repeal of prohibition began in the nineteen-twenties. Eleven states considered applications to Congress for a constitutional convention. Five adopted resolutions for a limited convention to propose the specific amendment. Congress responded to the pressure by proposing the twenty-first amendment.

Limitation of Federal Taxes

Federal taxes were greatly increased during the mid-nineteen-thirties. The American Taxpayers Association failed in its efforts to exert pressure on Congress for an amendment to limit the federal taxing power. The group then began a quiet campaign to apply pressure by use of the application procedure of article V. By 1945, seventeen states had submitted resolutions for the call of a convention.[11] The movement lost momentum but was revived again at the end of the decade. Representative Wright Patman from Texas attacked the advocates of the amendment, claiming that their purpose was to make the rich richer and the poor poorer. He advised the states to rescind their applications. By 1963, there were claims that thirty-four states had made applications to Congress, thus meeting the constitutional requirements for a convention.[12] Opponents of the amendment pointed to deficiencies in these claims: twelve states had rescinded their applications;[13] some resolutions had not requested a convention, but merely had asked Congress to propose the amendment; some applications were for other purposes; and the validity of resolutions passed fifteen or twenty years earlier was questionable.

Limitation of Presidential Tenure

When Franklin D. Rossevelt was elected to a third term, the belief that the tenure of the office of President should be limited gained adherents. In 1943, four states submitted applications to Congress requesting a national convention to propose

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an amendment to that effect. A few years later, an additional state adopted a similar resolution. Congress then proposed an amendment limiting the number of successive presidential terms.

World Federal Governments

At the beginning of the second world war, there was some support for the idea that the United States should commit itself to a world organization aimed at preserving peace. Twenty-three states adopted resolutions urging their representatives in Congress to support such a commitment. In 1949, six states made formal applications to Congress for a constitutional convention to propose an amendment authorizing the United States to participate in a limited world government. Within the following two years, half of the states rescinded their applications.[14]

Apportionment

The Supreme Court decisions establishing the "one-person-one-vote" principle and applying it to state legislature apportionment sparked the latest bout of serious interest in a national constitution convention.

The Council of State Governments in 1962 suggested a constitutional convention to propose amendments a) removing apportionment cases from federal jurisdiction, b) establishing a "Court of the Union" to hear certain appeals from the Supreme Court, and c) easing the process whereby states themselves may initiate constitutional amendments under article V.

In 1964, the Council of State Governments suggested an amendment exempting one house of any state legislature from the "one-person-one-vote" rule. When an amendment to that effect failed in the Senate in 1965 (gaining a majority of the votes but not the constitutionally required two-thirds), the Council and Senator Everett Dirksen initiated a national campaign to convene a constitutional convention to deal with the apportionment problem.[15]

By 1967, thirty-two states had applied for a constitutional convention, although their applications differed in form, content, and specificity. In the following years, one more state petitioned for a convention, and one withdrew its original application. Since 1969, no further applications have been submitted on this issue.

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Throughout the 1960's and into the present decade particularly salient issues have at one time or another provoked scattered applications for a constitutional convention; *e.g.*, school prayer in the early 1960's, revenue sharing and busing of school children to achieve integration more recently. None of these issues, however, has produced applications totalling near the two-thirds required by article V.[16]

Conclusion

It is submitted that the majority of applications presented issues of potentially national concern. In some instances, such as the nullification or the slavery issues, the question was initially a sectional concern, but national ramifications developed.

Another generalization that emerges from an historical analysis of the application process is that the majority of concerns raised in state applications have been resolved in some way other than by convention. In a large number of situations Congress took over the initiative and proposed the requested amendment to the Constitution. Numerous examples are readily available. The 1788 and 1789 applications of Virginia and New York for a general convention were resolved by congressionally proposed amendments—the Bill of Rights. Similarly, in the twentieth century, state applications that advocated direct election of senators, the limitation of presidential tenure, presidential disability and succession and the repeal of prohibition were resolved by congressionally proposed amendments. The problems raised by the state applications during the slavery period were resolved in a more revolutionary way. The Civil War and ultimately the thirteenth, fourteenth, and fifteenth amendments rendered the applications moot.

However, there are a number of situations in which there has been no resolution of the problem. In some instances, such as the issue of polygamy, a change in social attitudes over time led to the abandonment of the issue.

This example highlights a problem which may be inherent in the procedure itself: sluggishness. The problem has its roots in a fundamental distinction between the ratification process and the amendment process. While the former only requires the state legislatures to respond to an already form-

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ulated amendment the latter requires affirmative action. This is time-consuming since typically before drafting a resolution both houses of each state legislature consider all the other applications on the subject submitted to Congress by other states. The slavery period provides numerous examples of potential applications that were tabled in the state legislatures or were never reported back from committees. Action on the resolution is further delayed by the fact that state legislatures convene at different times during the year. Additional problems arise because Congress has not provided for adequate machinery to handle the applications presented to them. Thus, with the passage of time, new interests tend to replace the proposed interests, so that the issue is eventually resolved by a means other than the convention method or not resolved at all.

It is further evident that the issues that have called for a convention have been popular ones. Historically, although an individual state did not petition Congress for a convention on a particular issue, the state more often than not considered submitting a resolution. The states declining to submit applications generally did not reject the application procedure based on the substantive merits of the problem. Rather, the states expressed fear of the power of a constitutional convention and its potential for revolutionary change.

Notes

1 37 American State papers 6-7.

2 W. Pullen, *The Application Clause of the Amending Provision of the Constitution* 22-28 (1951) (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].

3 *Id.* at 38-39.

4 Massachusetts General Court Committee on the Library, *State Papers on Nullification* 223 (1834). The quote is from the resolution addressed to her co-states. The recommendation to Congress varies slightly.

5 *Pullen* at 66.

6 S. Jour 36th Cong., Spec. Sess. 404 (1861).

7 *Pullen* at 102.

8 1861 *Iowa S. Jour.* 68-69.

9 *Pullen* at 108.

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10 *Id.* at 115.

11 *Id.* at 119.

12 Graham, *The Role of the States in Proposing Constitutional Amendments,* 49 A.B.A.J. 1175, 1176-77 (1963).

13 See Appendix B.

14 *Pullen* at 126.

15 See Dirksen, *The Supreme Court and the People,* 66 Mich. L. Rev. 837 (1968).

16 See Appendix B, Part One, for a complete listing.

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